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Item 1 of the provisional agenda

FILLING OF A CASUAL VACANCY

Note by the Secretariat

Addendum

As of 21 April 1995, the name of the following candidate had been submitted for the seat which has become vacant as a consequence of the election on 26 January 1995 of Mr. Vladlen Vereshchetin as judge of the International Court of Justice:

Mr. Igor Ivanovich LUKASHUK (Russian Federation)

The curriculum vitae of the candidate is contained in the annex to the present document.

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ANNEX

Curriculum vitae of the candidate

[Original: English/Russian]

LUKASHUK, Igor Ivanovich
(Russian Federation)

Born 1 June 1926 in Kharkov, USSR.

Married, with two children.

Current professional and socio-academic activities

Chief researcher, International Law Centre, Institute of State and Law, Russian Academy of Sciences (1985-present);

Professor of international law, Academic University of Law (1992-present);

Member of the Academic Council on International Law, Institute of State and Law (1986-present);

Member of the Academic Council, Law School, Kiev State University (1965-present);

Representative of the President of the Russian Federation at the Federal Assembly on the draft statute on the international treaties of the Russian Federation;

Member of the Executive Committee of the Russian (formerly Soviet) Association of International Law (1961-present);

Individual member of the International Association of International Law (1965-present).

Earlier activities

Assistant Professor and Professor of International Law, Saratov Juridical Institute (1950-1963);

Chairman of the Department of International Law, Faculty of International Relations and International Law, Kiev State University (1963-1985);

Member of the delegations to the United Nations General Assembly and to the Commission on Human Rights; head of delegation to several diplomatic conferences, including the Vienna Conference on the Law of Treaties;

Member of the Soviet (Russian) national group at the Permanent Court of Arbitration (1982-1992).

Legal education, teaching and academic activities

Juridical Institute, Kharkov, Master of Law (1947);

Postgraduate course, Faculty of International Law, Juridical Institute, Kharkov (1947-1950);

Doctor of Law (1951);

Moscow Institute of International Relations, LLD (1962);

Professor of International Law (1965);

Presented courses and delivered lectures on international law at Kharkov, Saratov and Sverdlovsk Juridical Institutes, at the Universities of Moscow, St. Petersburg, Kazan, Odessa, Tbilisi, Azerbaijan, Latvia, Columbia, Yale, Harvard, Georgia State (Athens), Emory, Rutgers, Warsaw, Poznan, Mysor, Varanasy, Sofia, Bangui, Leipzig, Kiehl, Nottingham and also at the Academy of International Law, The Hague;

Delivered papers on different problems of international law at many national and international conferences of lawyers, professors and diplomats.

Main awards

Admitted to two orders and awarded 10 medals by the Government of the USSR;

Admitted to the "In Service of Africa" order by the Government of the Central African Republic.

Main fields of research

Formation of international law; norms, sources of international law; progressive development of international law; forms of international law; interpretation of international law; functioning of international law in municipal courts; international law and municipal law; law of treaties.

Main publications

Books

1. Treaty Drafting, 1957 (in Russian).

2. Form and Structure of International Treaties, 1961 (in Russian).

3. Modern International Law, 1962 (in Russian).

4. Representation of States in Treaty Relations, 1965 (in Russian).

5. Parties to Treaties, 1966 (in Russian).

6. Sources of International Law, 1966 (in Russian).

7. Course in International Law, vol. I, 1969 (co-author) (in Russian).

8. International Law, 1968.

9. Contemporary International Law, 1969 (co-author).

10. The Nature of Modern International Law, 1970 (in Russian).

11. Parties to Treaties - Right of Participation/Recueil des cours, 1972-1, The Hague.

12. Relations of Peaceful Coexistence and International Law, 1974 (in Russian).

13. International Legal Regulation (systems approach), 1975 (in Russian).

14. Socialism and International Law, 1977 (in Russian).

15. Mechanism of International Legal Regulation, 1980 (in Russian).

16. Universal International Law and New Political Thinking, Seoul, 1989.

17. Course in International Law (7 vols.), vols. 1 and 2, 1991 (co-author and chief editor) (in Russian).

18. Perestroika and International Law, Dordrecht, 1990 (co-author).

19. Control over Compliance with International Law, Dordrecht, 1991 (co-author).

20. Law and Force in the New International Order, Boulder Colorado, 1991 (co-author).

21. Droit international (M. Bedjaoui, rédacteur général), UNESCO, Paris, 1991 (co-author).

22. Functioning of International Law, 1992 (in Russian).

23. Russia and America, Vienna, 1992/New York, 1993 (co-author).

24. Constitutional Reform in Russia - 1992, Vienna, 1992 (co-author) (in German).

25. The Nuremberg Trials and International Law, Dordrecht, 1980 (co-author).

26. International Law in Municipal Courts, 1993 (in Russian).

Textbooks

1. International Law, 1971 (co-author and chief editor) (in Russian).

2. International Law, 1974 (co-author) (in Russian).

3. Course in International Law, 1979 (co-author) (in Russian).

4. International Law, 1982 (co-author) (in Russian).

5. International Law, 1979 (co-author) (in Portuguese).

6. International Law, 1990 (co-author) (in Russian).

The comprehensive list of publications on various questions of international, constitutional and penal law contains more than 260 titles. It includes publications which appeared in many countries, including Bulgaria, Poland, the United States, India, Germany, the Republic of Korea, China, the Netherlands and France, among others.

Languages: English, Ukrainian, Belarusian, German, Polish, Bulgarian, Slovakian, Serbian.

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THIRTEENTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

Mr. Doudou THIAM, Special Rapporteur

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I. INTRODUCTION

1. In his twelfth report 1/ on the draft Code of Crimes against the Peace and Security of Mankind, the Special Rapporteur announced his intention of limiting the list of such crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge.

2. This report will attempt to keep that promise. It will doubtless be a difficult and delicate task, given the opposing tendencies that exist within the Commission: an expansive tendency that favours as comprehensive a Code as possible and a restrictive tendency that wants the scope of the Code to be as narrow as possible.

3. Proposing a definitive list of the offences to be included poses something of a dilemma. If the Special Rapporteur follows the maximalist tendency, he runs the risk of reducing the draft Code to a mere exercise in style, with no chance of becoming an applicable instrument. Conversely, if he follows the restrictive tendency, he could end up with a mutilated draft.

4. Having studied the criticisms and observations made by Governments, 2/ the Special Rapporteur is proposing a more restricted list than that adopted on first reading. This is what the vast majority of Governments want. In order for an internationally wrongful act to become a crime under the Code, not only must it be extremely serious but the international community must decide that it is to be included. Extreme seriousness is too subjective a criterion and leaves room for considerable uncertainty. Other factors, notably technical and political ones, are involved in the drafting and adoption of a Code of Crimes against the Peace and Security of Mankind.

5. From a technical standpoint, the diversity of legal systems complicates the task of defining an international offence.

6. From a political standpoint, any codification exercise must, in order to be successful, be supported by a clearly expressed political will. In the present case, this means not just one political will but the convergence of several political wills. Since this convergence of wills has proved difficult to achieve on a large number of draft articles, the Special Rapporteur has been forced to reduce the list proposed on first reading. 3/

1/ A/CN.4/460 and Corr.1.

2/ A/CN.4/448 and Add.1.

3/ The list proposed on first reading was the following: 1. aggression; 2. threat of aggression; 3. intervention; 4. colonial domination and other forms of alien domination; 5. genocide; 6. apartheid; 7. systematic or mass violations of human rights; 8. exceptionally serious war crimes; 9. recruitment, use, financing and training of mercenaries; 10. international terrorism; 11. illicit traffic in narcotic drugs; 12. wilful and severe damage to the environment.

7. The draft articles submitted to Governments met with a varied reception. There was strong opposition to some of them on the part of several Governments, while others were the subject of reservations or criticisms as to their form or their substance.

8. The draft articles that fall into the first group are the following: (a) draft article 16 on the threat of aggression; (b) draft article 17 on intervention; (c) draft article 18 on colonial domination and other forms of alien domination; and (d) draft article 26 on wilful and severe damage to the environment.

9. The Special Rapporteur believes that the Commission should beat a retreat on these draft articles and abandon them for the time being. There was little support for the draft articles on the threat of aggression and intervention because Governments found them vague and imprecise. They fail to meet the standards of precision and rigour required by criminal law.

10. The draft articles on colonial domination and other forms of alien domination and wilful and severe damage to the environment were equally unpopular with Governments that expressed an opinion on them. Although article 19 of the draft articles on State responsibility characterizes as international crimes both colonial domination and other forms of alien domination and serious damage to the human environment, for the time being these draft articles do not seem to have convinced Governments. We shall have to wait until developments in international law confirm or reverse the tendency to consider these acts as crimes.

11. That leaves the draft articles on which there were reservations, namely: 1. article 20 on apartheid; 2. article 23 on the recruitment, use, financing and training of mercenaries; 3. article 24 on international terrorism; and 4. article 25 on illicit traffic in narcotic drugs.

12. Several observations were made about apartheid:

(a) One Government said that it had no substantive objections but proposed dropping the word "apartheid" and replacing it by the words "institutionalized racial discrimination";

(b) Two Governments felt that apartheid came under the "systematic or mass violations of human rights" covered by draft article 21 and that there was no need to devote a specific article to it;

(c) Two other Governments took the view that since apartheid had been dismantled in the one country where it had been applied, it no longer had a place in the draft.

13. The Special Rapporteur believes that even if the word "apartheid" is dropped, there is no guarantee that the phenomenon to which it refers will not reappear. As a result, the proposal to replace the word "apartheid" by the words "institutionalization of racial discrimination" is not without interest. However, rather than propose a new draft article on apartheid, the Special Rapporteur will abide by whatever position the Commission takes.

14. Let us now turn to draft article 23 on the recruitment of mercenaries. According to some Governments, this phenomenon is neither widespread nor sufficiently serious to be included in the Code. Besides, the Convention on mercenaries has been signed by only a handful of countries.

15. The Special Rapporteur thinks that these criticisms are groundless. The phenomenon could well re-emerge in some parts of the world, particularly the underdeveloped world, and disrupt peace and security. He believes, however, that the acts covered by the draft article could be prosecuted as acts of aggression and that there might, as a result, be no need to devote a separate article to them.

16. On the other hand, the Special Rapporteur believes that the Commission should retain the draft article on terrorism, with some changes. For instance, it should be recognized that not only agents or representatives of a State may commit terrorist acts, but also private individuals acting as members of a group, movement or association. The draft article proposed by the Special Rapporteur for the second reading takes this possibility into account.

17. This leaves draft article 25 on traffic in narcotic drugs, which prompted some questions. According to one Government, "It may be asked what is to be gained by including in the Code an activity which is viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them".

18. Governments which asked this question are perhaps unaware that it was at the request of other Governments that the Commission was instructed to prepare a draft statute for an international criminal court. Drug traffickers have formed powerful organizations which can threaten the stability and security of some States. Those who question the appropriateness of targeting narcotic drug trafficking in the Code would do well to consider the following observation by the Swiss Government: "After all, such traffic can be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed ever closer links between international drug trafficking and local or international terrorism. It is not without good reason that people commonly speak of 'narcoterrorism'. Apart from the harmful effects it has on health and well-being, international drug trafficking has a destabilizing effect on some countries and is therefore an impediment to harmonious international relations. In this connection, international drug trafficking indeed appears to be a crime against the peace and security of mankind. The Commission is therefore correct to include, in the draft Code, a provision criminalizing such traffic, whether it is carried out by agents of a State or simply by individuals." 4/

19. The considerations summarized above prompted the Special Rapporteur to substantially reduce the draft adopted on first reading. The offences that remain are thus the following:

4/ A/CN.4/448, chap. III, reply from Switzerland, art. 25.

(a) Aggression;

(b) Genocide;

(c) Crimes against mankind;

(d) War crimes;

(e) International terrorism;

(f) Illicit traffic in narcotic drugs.

20. This reduces the number of offences from 12 to 6. The present report will deal with those six offences. There may be some for whom even this list will be too long and who will say that the content of the Code must be pared down still further. That will be for the Commission to decide.

21. However, one last observation is in order. It will have been noted that Governments did not respond to the request that they propose a penalty for each crime.

22. The reason for this is that it is difficult to determine a specific penalty for each crime. In one of his reports on applicable penalties, the Special Rapporteur proposed that, instead of fixing a penalty for each offence, a scale of penalties should simply be established, leaving it up to the courts concerned to determine the applicable penalty in each case.

23. In fact, all the offences covered in the Code are considered to be extremely serious and it would be difficult, in the Code, to stipulate different penalties for offences which are uniformly considered to be extremely serious. Only the courts can determine what penalty would be just, given the circumstances of each case and the personality of the accused.

24. This has, moreover, been the method followed by the charters or statutes of international criminal courts. According to the Charter of the Nürnberg International Military Tribunal (art. 27), "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just". Similarly, according to the Charter of the International Military Tribunal for the Far East (art. 16), "The Tribunal shall have the power to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just".

25. Closer to home, the Statute of the International Criminal Tribunal for the former Yugoslavia provides (art. 24): "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".

26. Lastly, according to the draft Statute for an international criminal court adopted by the Commission at its most recent session (art. 47):

"1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of life imprisonment, or of imprisonment for a specified number of years;

(b) a fine.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:

(a) the State of which the convicted person is a national;

(b) the State where the crime was committed; and

(c) the State which had custody of and jurisdiction over the accused."

27. One notes the flexibility of these various provisions, which give the courts a certain latitude, albeit within certain established limits, of course.

28. This is the course that the Special Rapporteur had proposed. Such an approach does not conflict with the principle of nullum crimen sine lege because the Statute itself guides the courts and indicates the minimum and maximum penalties.

29. It is now for the Commission, given the silence of Governments on the matter of applicable penalties, to choose which course to follow.

30. If it decides to establish in the Statute itself the penalties applicable to each crime, this method could come up against the difficulty of reaching an agreement, within the Commission, on appropriate penalties. If such an agreement is not reached, it will be necessary to resort to one of the methods outlined above.

31. It is regrettable that the draft Statute for an international criminal court, as recently prepared by the Commission, determined the applicable penalties when this should normally have been done in the draft Code. The Commission will have to take this situation into account when it comes to deal, in the draft Code, with the problem of the penalties applicable to crimes against the peace and security of mankind.

II. DRAFT ARTICLES

PART II

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 15. Aggression

A. Text of the draft

32. The draft article approved on first reading was the following:

"1. An individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced to:

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. Any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any

extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration."

B. Observations of Governments

Australia

33. The Australian Government takes the view that draft article 15 encompasses, in addition to wars of aggression, unjustified acts of aggression short of war. This goes beyond existing international law which criminalizes wars of aggression only. While the international community would identify acts of aggression short of wars of aggression as illegal and hold the delictual State responsible for its illegality, it does not follow that the international community is willing to recognize that individuals in the delictual State are guilty of international crimes. Australia considers that the implications of criminalizing individual acts in these circumstances should be further considered.

34. A further difficulty arises for Australia from the reference in draft article 15 to the Security Council. The definition of aggression both includes (draft article 15 (4) (h)) "any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter" and

excludes (draft article 15 (3)), acts which the Security Council determines not to be acts of aggression because of other relevant circumstances. The relationship between the Code and the Security Council is an exceptionally difficult problem, as the Commission notes. Under constitutional systems based on the separation of judicial power, a central element in an offence could not be left to be conclusively determined by an international executive agency such as the Security Council.

Belarus

35. While welcoming the inclusion in article 15 of responsibility for the planning of aggression, the competent bodies of Belarus consider that the list of criminal acts should also include the preparation of aggression, particularly since planning is only one of the elements of preparation.

36. According to the Government of Belarus, with regard to the distinction made in the article between the functions of the Security Council and those of the judicial authorities, it should be noted that the distinction can be viewed only as a temporary measure. If the Security Council's determination as to the existence of an act of aggression is to have binding force on national courts, what is needed, in our view, is not only a legal formulation of this obligation in an international treaty, but also the existence and observance of some juridical procedure (for example, a requirement for the preliminary establishment of a commission of investigation), which would guarantee the objectivity of the Council's decision. Clearly this decision can in no way prejudge the question of the guilt of a particular individual in committing aggression.

37. Belarus also notes that if an international criminal court is established within the United Nations, the question of the delimitation of competence between it and the Security Council will require further study.

Paraguay

38. The Government of Paraguay states that, in answer to the request of the International Law Commission, it would like to make a few comments on the provisions of the draft Code. Some, for example the one concerning article 15, relate simply to form or legislative technique. Article 15 states - as do others - that an individual who ... commits one of the crimes specified in the draft Code "shall, on conviction thereof, be sentenced ...". The phrase "on conviction thereof" is clearly redundant, for a person cannot be sentenced until he has been tried and found guilty.

United Kingdom of Great Britain and Northern Ireland

39. The United Kingdom has grave doubts concerning article 15. According to the Government, most of this article is a repetition of the definition of aggression contained in General Assembly resolution 3314 (XXIX) of 14 December 1974. That resolution was intended to assist the General Assembly and the Security Council by clarifying a key concept in the Charter of the United Nations, but one which has been left undefined. The United Kingdom agrees entirely with those members of the Commission who considered that a

resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before a judicial body. It is patently insufficient for the commentary to suggest that this criticism is met by failing to mention the resolution by name. The wording of the resolution needs careful adaptation in order to prescribe clearly and specifically those acts which attract individual criminal responsibility. Paragraph 4 (h) offends against the principle of nullum crimen sine lege, as well as operating with potential retrospective effect in contravention of article 10.

United States of America

40. The United States Government notes that the Code's definition of aggression is taken from the General Assembly's 1974 definition of aggression (resolution 3314 (XXIX)). The General Assembly, however, did not adopt this definition for the purpose of imposing criminal liability, and the history of this definition shows that it was intended only as a political guide and not as a binding criminal definition.

Switzerland

41. The Swiss Government considers that the proposed definition of aggression rests mainly - and with perfect justification - on that contained in General Assembly resolution 3314 (XXIX) of 14 December 1974. That, however, is a text intended for a political organ. Moreover, under the terms of Article 39 of the Charter of the United Nations, it is the Security Council which is responsible for determining the existence of any threat to the peace, breach of the peace, or act of aggression. The question, therefore, is whether the national judge should be bound by the Council's determinations. In some respects, this would appear desirable. Indeed, it is hard to see how a national judge could characterize an act as aggression, if the Council, which bears the primary responsibility for peace-keeping, had not found it to be so. On the other hand, everyone knows that the Council can be paralysed by the exercise of the veto. Decisions of the courts would therefore be subordinate to those of the Council. It is not certain that the security of law would benefit therefrom. To suggest that decisions of the Security Council, a political organ if ever there was one, should serve as a direct basis for national courts when they are called upon to establish individual culpability and determine the severity of the penalty does not seem to be in keeping with a sound conception of justice. Accordingly, it would be just as well not to include paragraph 5 which appears in square brackets.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

42. With the exception of paragraphs 1 and 2, the draft adopted on first reading was the subject of numerous criticisms by Governments, which observed that:

(a) Paragraph 3, on evidence of aggression, does not seem to belong in a definition of aggression;

(b) The enumeration of acts of aggression given in paragraph 4 is not exhaustive;

(c) Moreover, the Security Council may conclude that "a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances" (para. 3);

(d) Paragraph 4 (h) states that, in addition to the acts listed, any other acts may be "determined by the Security Council as constituting acts of aggression under the provisions of the Charter";

(e) Paragraph 5 makes national courts subordinate to the Security Council, which is a political organ;

(f) Paragraphs 6 and 7, on the scope of the Charter and on the self-determination, freedom and independence of peoples, are political provisions and do not belong in a legal definition.

43. These criticisms, echoing many others made on the occasion of earlier attempts to define aggression, prompt the Special Rapporteur to ask the following question: "Is a legal definition of the concept of aggression possible?".

44. Mr. Jean Spiropoulos, the previous Special Rapporteur of the International Law Commission on the draft Code of Offences against the Peace and Security of Mankind, asked himself the same question in 1951. The conclusion he came to was that: "the notion of aggression is a notion per se, a primary notion, which, by its very essence, is not susceptible of definition ... A 'legal' definition of aggression would be an artificial construction which, applied to concrete cases, could easily lead to conclusions which might be contrary to the 'natural' notion of aggression ...". 5/

45. This was also the position taken by another specialist in international criminal law, Mr. Stefan Glaser, who wrote that the concept of aggression had yet to be defined successful in international law. The enumerative definition found in the London treaties of 1933 (the so-called Litvinov-Politis definition), when put to the test, had revealed lacunae and had failed to cover all the cases of aggression that had arisen in the international arena ... Since then, all efforts made within the League of Nations, and subsequently under the auspices of the United Nations, to arrive at a satisfactory definition of aggression had failed. The experts of different international organizations entrusted with the task had reached the conclusion that the concept of aggression was, in fact, legally undefinable, meaning that it did not lend

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5/ Yearbook of the International Law Commission, 1951, vol. II, document A/CN.4/44, paras. 165 and 166.

itself to an analytical definition; no matter how detailed that definition might be, it would never be exhaustive. 6/

46. Indefatigable, the international community pursued its efforts, which culminated in General Assembly resolution 3314 (XXIX) of 14 December 1974 on the definition of aggression. However, this resolution was adopted by the Assembly without a vote.

47. Nowadays, many Governments doubt whether it can serve as the basis for a legal definition of aggression or as the justification for a judicial decision.

48. In these circumstances, the Commission has three options: it can refer to aggression without defining it, it can limit itself to a general definition or it can accompany the general definition by a non-limitative enumeration.

49. This last method has often been adopted in international conventions defining international crimes, for instance, in the Martens clause of the preamble to the Convention concerning the Laws and Customs of War on Land of 1907 and in the Charter of the Nürnberg International Military Tribunal, where article 6 (b) on violations of the laws or customs of war, states that such violations shall include, "but not be limited to", murder, ill-treatment, etc.

50. The same approach was taken only recently in the Statute of the International Criminal Tribunal for the former Yugoslavia and was also used in the 1954 draft Code of Offences against the Peace and Security of Mankind, which defined such offences as "inhuman acts such as ...".

2. New text proposed by the Special Rapporteur

51. Recognizing the impossibility of enumerating all acts that would constitute aggression, the Special Rapporteur proposes the following general definition:

"Aggression

1. An individual who as leader or organizer is convicted of having planned or ordered the commission of an act of aggression shall be sentenced to ...

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."

6/ Droit international pénal conventionnel (Brussels, Ed. Emile Bruyont, 1970), pp. 6 ff.

3. Commentary

52. What now remains is to answer an important question raised by one Government, namely: are we to criminalize acts of aggression or wars of aggression?

53. According to that Government, the distinction between an act of aggression and a war of aggression is based on the fact that an act of aggression is less serious than a war of aggression and does not have the same legal consequences. An act of aggression is simply a wrongful act which results in the international responsibility of the State which committed it, whereas a war of aggression results in the criminal liability of the leaders of that State.

54. It is questionable whether the distinction between the concepts of act of aggression and war of aggression is clear-cut. Are not some acts of aggression, such as the invasion or annexation of territory or the blockading of the ports of a State, sufficiently serious to constitute crimes? We should avoid further complicating what is, intrinsically, already an extremely complex issue.

Article 19. Genocide

A. Text of the draft

55. The draft article approved on first reading was the following:

"1. An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced to ...

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group."

B. Observations of Governments

Australia

56. While Australia has no difficulties with the substance of this article, which is based entirely on the definition in article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the issue of the applicable penalty requires further attention by the Commission.

57. The Government believes that the penalty to be specified in article 19 (1) may well be inconsistent with the Genocide Convention, which requires States parties to "provide effective penalties for persons guilty of genocide".

Ecuador

58. The Government believes that paragraph 2 (d) should be clarified. As currently drafted, it is vague and could create misunderstanding and confusion between purely social birth control programmes and crimes of genocide.

Paraguay

59. The Government of Paraguay notes that the crime of genocide was defined in an earlier international convention adopted in 1948 and that the definition remains unchanged in this instrument. If any change is to be made, paragraph 2 (e) could be expanded to cover adults as well as children.

United Kingdom

60. According to the United Kingdom, the Commission should consider the relationship between the Code and article IX of the Genocide Convention, which provides for the compulsory jurisdiction of the International Court of Justice in the case of disputes between Contracting Parties relating, inter alia, to the responsibility of a State for genocide.

United States

61. The United States Government notes that the crime of genocide is already defined by the Convention on the Prevention and Punishment of the Crime of Genocide, to which the United States and many other States are parties. United States ratification of the Convention was based on several understandings. In particular, the United States indicated that it understands that the term "intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such", as used in the Convention, means the "specific intent to destroy, in whole or substantial part, a national, ethnic, racial or religious group as such" by the acts prohibited in the Convention. The Code's definition, in contrast, fails to establish the mental state needed for the imposition of criminal liability.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

62. Many amendments have been proposed to both the form and the substance, but the Special Rapporteur considers it preferable to stay close to the Genocide Convention, since genocide is the only crime on which the international community is in very broad agreement.

2. New text proposed by the Special Rapporteur

63. The Special Rapporteur therefore proposes the following new text:

"Genocide

1. An individual convicted of having committed or ordered the commission of an act of genocide shall be sentenced to ...

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. An individual convicted of having engaged in direct and public incitement to commit genocide shall be sentenced to ...

4. An individual convicted of an attempt to commit genocide shall be sentenced to ...".

Article 21. Systematic or mass violations of human rights

A. Text of the draft

64. The draft article adopted on first reading is the following:

"An individual who commits or orders the commission of any of the following violations of human rights:

- Murder;
- Torture;
- Establishing or maintaining over persons a status of slavery, servitude or forced labour;
- Persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
- Deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to ...]."

B. Observations of Governments

Australia

65. Australia notes the stated intention of the Commission that only the most serious international delicts be considered as crimes. This is consistent with the philosophical basis of international criminal law and the expressed attitude of States on the matter.

66. There are, however, some problems with draft article 21 in its current form. In particular, Australia has concerns about the lack of definition of the elements of the crimes set out in this draft article. It notes the view of the Commission that, as the definitions are included in other international instruments, it is unnecessary to repeat them in the Code. However, not all the crimes are so defined. There is, for example, no agreed definition of persecution in any international instrument.

67. Reliance on other instruments for definitions of the crimes in article 21 could also cause difficulties. For example, the definition of torture in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment limits the crimes to acts committed by public officials or persons acting in an official capacity. In contrast, the chapeau to article 21 indicates that responsibility for any of the enumerated crimes extends to any individual committing the offence.

68. Australia notes in this regard that draft articles 15, 19, 20, 22 and 23 include definitions of offences despite the fact that definitions are to be found in other international instruments.

69. Draft article 21 is also limited in its scope in that it does not (as in the case with draft articles 15 and 16) allow for "other similar acts". Australia agrees with the observation set out in the Commission's commentary that the practice of systematic disappearance of persons is worthy of special reference in the context of this draft article. It is not certain that persecution on social, political, racial, religious or cultural grounds would cover the practice of systematic disappearances.

Austria

70. The Austrian Government notes that the relation between the provisions of article 21 and article 22 (ideal concurrence of crimes or cumulation) asks for further clarification. If article 21 should only be applicable in times of peace, this should be emphasized.

Brazil

71. In the view of the Brazilian Government, in the case of article 21, although it is entitled "Systematic or mass violations of human rights", the text could be read as implying that individual cases of murder or torture would be crimes against the peace and security of mankind. It seems necessary, therefore, to clarify the scope of the limitative expression "in a systematic manner or on a mass scale", in order to indicate that the Code will only cover facts of international relevance committed or not with the toleration of the State power.

Bulgaria

72. The Bulgarian Government proposes that in article 21 the expression "persecution on social, political, racial, religious or cultural grounds" be supplemented by the expression "including inhuman and degrading treatment based on such grounds".

Paraguay

73. In the view of the Paraguayan Government, the crime covered in article 21 is similar to the crime of genocide (art. 19), as can be seen by comparing the provisions of the two articles. However, this article does not mention the underlying motive for the crime of genocide, and it refers to systematic or mass violations of human rights. The differences do not seem to be fundamental.

United Kingdom of Great Britain and Northern Ireland

74. The United Kingdom believes that attention must plainly be paid to systematic or mass violations of human rights in any code of crimes under international law. Two requirements must be met before an act qualifies as "systematic or mass violations of human rights": the exceptional seriousness of the act and its systematic manner or mass scale. The express list of acts is welcome, but the article is incomplete and unsatisfactory. The commentary makes clear that definitions of the terms used, such as torture or slavery, are to be found in existing international conventions. Even assuming that national courts would be able to identify the relevant source, the definitions contained therein

are not free from controversy. Indeed, as the commentary indicates, there may be doubt whether the definition of torture contained in the Torture Convention should be limited to the acts of officials. As currently drafted, the article contains no precise definition of criminal conduct nor any clear unifying concept.

United States of America

75. The United States Government is of the view that article 21 is too vague to impose criminal liability. The crime of "persecution on social, political, racial, religious or cultural grounds" in particular is so vague that it could mean almost anything. For example, one definition of "persecute" is "to annoy with persistent or urgent approaches, to pester". 4/ It should not be an international crime for one political party to "annoy" or "pester" another political party, yet under the plain meaning of the draft Code that could be an international crime. This article also fails to fully consider the effect of the International Covenant on Civil and Political Rights, 5/ which spells out the specific human rights recognized by the vast majority of the international community. This article also appears to embrace common crimes, such as murder. The United States does not believe that it would be useful or even sensible to make every murder an international crime. We note further that deportation of persons may under many circumstances be lawful; this current formulation is thus overly broad.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

76. One Member State notes that the list of acts constituting crimes against humanity is too limited, as it does not include the term "other inhumane acts".

77. This comment is valid. It is impossible to provide a complete list of acts constituting such crimes. The Charter of the Nuremberg Tribunal (art. 6 (c)), the Charter of the Tokyo Tribunal (art. 5 (c)) and Law No. 10 of the Allied Control Council for Germany (art. II, para. 1 (c)) used the term "other inhumane acts".

78. More recently, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 refers also, in the definition of crimes against humanity, to "other inhumane acts" (art. 5 (i)).

79. Concerning torture, one Member State comments that the draft adopted on first reading does not provide a definition of this concept and is confined to referring in its commentary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the scope of application of this Convention is limited to acts committed by agents or representatives of a State.

80. The Special Rapporteur recognizes that the comment regarding possible perpetrators of crimes against humanity is valid and that individuals must also be covered. As to the definition of torture, the Special Rapporteur placed in brackets the overly long definition contained in the Convention against Torture. The Commission must decide whether or not to retain it.

81. Another comment relates to the word "persecution", for which no definition is given.

82. It should be recalled that "persecution" is used in the three basic texts relating to the charters of the international military tribunals which defined crimes against humanity. It is used also in judgements of the international tribunals which had to judge crimes against humanity following the Second World War.

2. New text proposed by the Special Rapporteur

83. The Special Rapporteur therefore proposes the following new text:

"Crimes against humanity

"An individual who, as an agent or a representative of a State or as an individual, commits or orders the commission of a crime against humanity shall, on conviction thereof, be sentenced [to ...].

"A crime against humanity means the systematic commission of any of the following acts:

"- Wilful killing;

"- Torture [i.e., intentionally inflicting on a person pain or acute physical or mental suffering for the purposes of, inter alia, obtaining information or confessions from him or from a third person, punishing him for an act which he or a third person has committed or is suspected of committing, intimidating or exerting pressure on him, intimidating or exerting pressure on a third person, or for any other reason grounded in some form of discrimination.

This text does not include pain or suffering resulting solely from lawful punishment or inherent in or caused by such punishment.];

"- Reduction to slavery;

"- Persecution;

"- Deportation or forcible transfer of population;

"- All other inhumane acts."

3. Commentary

84. In this new text, the Special Rapporteur preferred to use the title "Crimes against humanity" rather than the title adopted on first reading, which was "Systematic or mass violations of human rights".

85. The term "crimes against humanity" is, in fact, an established term which has been enshrined in the legal lexicon, since it is used even in domestic law. Since the end of the Second World War this term has existed in numerous legal instruments. 7/ Still more recently it has been used in the Statute of the International Criminal Tribunal for the former Yugoslavia. 8/

86. If the current draft abandoned the term "crimes against humanity", questions might arise as to the reasons for such a reversal. Would the Commission have a good reason for replacing "crimes against humanity" with "systematic or mass violations of human rights"? It appears doubtful.

87. In proposing this latter term, the Commission wished to emphasize two aspects of such crimes which it deemed very important, namely, their systematic and their massive nature.

88. However, one of these two aspects (the mass element) is too controversial. Those who hold that a crime against humanity is characterized by its massive nature rely on the fact that the charters of the tribunals referred to above define crimes against humanity as acts "directed against the civilian population" or "any civilian population". They believe that, because of their large numbers of victims, such crimes are necessarily mass crimes.

89. However, contrary to this argument, many authors and even a good number of judicial precedents hold that a crime against humanity is not necessarily a crime of a massive nature. They note that some acts referred to in the texts are not necessarily mass crimes: murder, torture and rape, as referred to in Law No. 10, can as easily be directed against individual victims as collective victims.

90. According to Mr. Henri Meyrowitz, "Nothing supports the claim that such crimes which, in common law, are deemed to have occurred where there is only a single victim, are not apt to constitute crimes against humanity. Even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution." 9/

7/ Charter of the Nuremberg International Military Tribunal (art. 6 (c)); Charter of the International Military Tribunal for the Far East (art. 5 (c)); Law No. 10 of the Allied Control Council for Germany (art. II (c)).

8/ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (art. 5).

9/ Henri Meyrowitz, La répression par les tribunaux allemands des crimes contre l'humanité (Paris, LGDJ, 1960).

91. Similarly, Mr. Sawicks, in his report to the Eighth International Conference for the Unification of Penal Law, wrote: "Crimes against humanity usually occur en masse. Yet this is not the characteristic which distinguishes this type of crime from an ordinary crime. The mass element is an accessory, although not an incidental, feature." 10/

92. This controversy occurs also at the level of jurisprudence. The argument as to massive nature was upheld chiefly by the American tribunals. Thus, in Case III, 11/ the defendants were accused of having knowingly participated in a system of cruelty and injustice extending throughout the country ... violating the laws of war and of humanity. The judgement stated that isolated cases of atrocities and persecution were to be excluded from the definition.

93. However, that was not the opinion of the tribunals in the British zone which, on the contrary, stated that the mass element was not essential to the definition, in respect of either the number of acts or the number of victims. In general, the argument upheld by the tribunals in the British zone was that what counted was not the mass aspect, but the link between the act and a cruel and barbarous political system, specifically, the Nazi regime.

94. After an extensive review of the jurisprudence of the tribunals in the British zone, Mr. Meyrowitz concluded: "The tribunals in fact decided that what renders an offence a crime against humanity is neither the number nor the nature of the victims, but the fact that the offence is linked to systematic persecution of a community or a section of a community. An inhumane act committed against a single individual can also constitute a crime against humanity." Mr. Meyrowitz based this conclusion in particular on a clarification from the British military government (Zonal Office of the Legal Adviser) dated 15 October 1948, 12/ stating that an individual crime can constitute a crime against humanity "if the motive for this act resides, in whole or in part, in such systematic persecution".

95. It follows from the foregoing that the notion that a crime against humanity must be of a massive nature is controversial and that "the characterization of crimes against humanity should in fact be interpreted as including, alongside acts directed against individual victims, acts of participation in mass crimes".

96. On the other hand, the systematic nature of crimes against humanity, far from being a subject of dispute, constitutes a necessary condition.

97. For this reason, the Special Rapporteur deemed it necessary to replace the title of the draft adopted on first reading with the title "Crimes against humanity"; far from being a subject of dispute, it has been adopted by Member States, which have incorporated it into their domestic law.

10/ Acts of the Conference, p. 135.

11/ American Military Tribunal, Case III, vol. III, p. 985; cited in Meyrowitz, op. cit., pp. 252 and 253.

12/ Meyrowitz, op. cit., p. 280 in fine.

Article 22. Exceptionally serious war crimes

A. Text of the draft

98. The draft article adopted on first reading is the following:

"1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

"2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) Acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) Establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) Use of unlawful weapons;

(d) Employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) Large-scale destruction of civilian property;

(f) Wilful attacks on property of exceptional religious, historical or cultural value."

B. Observations of Governments

Austria

99. The Austrian Government believes that the expression in square brackets in article 22, paragraph 2 (a), should be retained. The fact that the enumeration is only descriptive is sufficiently emphasized by the words "in particular".

Paraguay

100. The Paraguayan Government notes that there are already many international conventions on war crimes, and these are referred to in the commentary on this article. It is legitimate to ask whether there is any need to have yet another category of crime, namely exceptionally serious war crimes, and whether degree of seriousness is a sound criterion to use in defining an offence for which

other characterizations already exist. Degree of seriousness is, however, a valid criterion to use in determining the severity of the punishment.

United Kingdom of Great Britain and Northern Ireland

101. The United Kingdom is of the view that in opting for a "middle-ground solution", reconciling competing trends within the Commission, the Commission risks proliferating the categories of war crimes without any attendant benefit. If the Commission were to retain this article, the United Kingdom would prefer to see a provision which accords with existing characterizations of war crimes, replacing "exceptionally serious war crimes" with "grave breaches of the Geneva Conventions", for example.

United States of America

102. The United States Government is of the view that article 22 seeks to punish "exceptionally serious war crimes", a term which is tautologically defined as "an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of, inter alia, acts of inhumanity ...". This article is too vague and fails to consider and specifically incorporate the relevant provisions of the many international conventions specifically dealing with the law of armed conflict.

103. The vague prohibition on the "unlawful use of weapons" does not reflect the complex realities of warfare or the international legal mechanisms established to regulate its conduct. Moreover, the United States thinks it unwise to include only "exceptionally serious war crimes" and ignore other breaches of the laws of war that are also of great concern to the peace and security of mankind.

Switzerland

104. Switzerland believes that in international humanitarian law, there are now two categories of violations: on the one hand, there are "grave breaches" which have already been enumerated (arts. 50, 51, 130 or 147, depending upon which of the four Geneva Conventions of 1949 one is consulting, and art. 85 of Protocol I additional to the Geneva Conventions which also refers to article 11 of the same Protocol); these are also called war crimes; on the other hand, there are all the other violations of international humanitarian law.

105. The Commission, faithful to the principle that only extremely serious acts should be included in the Code, proposes to introduce a third category, that of "exceptionally serious war crimes", which would therefore encompass especially serious "grave breaches". Accordingly, we must realize that, once the Code is in force, war crimes not enumerated in this provision may, as a result of article 22, be subject only to a relatively light penalty.

106. In addition, the Swiss Government finds it hard to understand why the Commission characterized "large-scale destruction of civilian property" (para. 2 (e)) as an "exceptionally serious war crime", but not attacks against the civilian population or demilitarized zones, or perfidious use of the protective emblems of the Red Cross and the Red Crescent.

107. It would, therefore, be advisable for the Commission to reconsider the impact which this provision is liable to have on international humanitarian law, before adopting it on second reading.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

108. The comments from Member States unanimously express reservations concerning this new concept of exceptionally serious war crimes.

109. After extensive reflection, the Special Rapporteur has found these reservations to be valid, mainly because it is difficult in practice to establish an exact dividing line between the "grave breaches" defined in the Geneva Conventions and Additional Protocol I and the "exceptionally grave breaches" stipulated in the draft adopted on first reading.

2. New text proposed by the Special Rapporteur

110. The Special Rapporteur therefore proposes to amend the title and content of the draft as follows:

"War crimes

"An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced to [...].

"For the purposes of this Code, a war crime means:

"1. Grave breaches of the Geneva Conventions of 1949, namely:

(a) Wilful killing;

(b) Torture or inhuman treatment, including biological experiments;

(c) Wilfully causing great suffering or serious injury to body or health;

(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) Compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

(f) Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) Unlawful deportation or transfer or unlawful confinement of a civilian;

(h) Taking civilians as hostages.

"2. Violations of the laws or customs of war, which include, but are not limited to:

(a) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(d) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) Plunder of public or private property."

3. Commentary

111. In this new draft, the method of defining war crimes is based directly on the Statute of the International Criminal Tribunal for the former Yugoslavia.

112. This method distinguishes grave breaches which, as in the Geneva Conventions and Additional Protocol I, form an exhaustive list, from other violations of the laws or customs of war, which form a non-exhaustive list.

113. This new draft should make it possible to conclude the lengthy debate in the Commission between supporters of an exhaustive list of war crimes and supporters of a non-exhaustive list.

Article 24. International terrorism

A. Text of the draft

114. The draft article adopted on first reading is the following:

"An individual who is an agent or representative of a State commits or orders the commission of any of the following acts:

- undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public shall, on conviction thereof, be sentenced [to ...]."

B. Observations of Governments

Australia

115. Australia has difficulties with the drafting of article 24. It notes in particular that the definition is not expressed to include an element of violence. Is therefore the offence intended to encompass non-physical acts of terror such as propaganda? Further, it is uncertain whether the agents or representatives need to be acting in their official capacity. The absence of intention or motive from the definition (cf. the 1937 Convention for the Prevention and Punishment of Terrorism) also needs explanation.

Austria

116. The Austrian Government proposes that article 24 should be amended as follows, which would also allow a definition of the term "terrorist activities":

> "1. An individual who, as an agent or representative of a State, commits or orders the commission of any of the following acts:
>
> - undertaking, organizing, assisting, financing, encouraging or tolerating terrorist activities against another State, shall be sentenced (to ...).
>
> "2. Terrorist activities are acts directed at persons or property of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public."

Belarus

117. The Government of Belarus believes that in article 24, the category of perpetrators of crimes of international terrorism should be expanded. The Code cannot disregard the scale of acts of international terrorism committed by terrorist organizations and groups which are not necessarily linked to a State, and the threat posed by such acts to the peace and security of mankind. In any event, the participation of a State cannot be a criterion for defining terrorism as a crime against the peace and security of mankind.

Brazil

118. The Brazilian Government is of the view that there is an international element in the crime of terrorism ("as an agent or representative of a State ... against other State") meaning that the crime described in article 24 may only be punished in accordance with the Code when it is committed or ordered by an agent or representative of a State against another State.

Norway

119. In the view of the Norwegian Government, the scope of the provision is too narrow from a substantive point of view. It is difficult to understand why only cases where the terrorist is "an agent or representative of a State" should be covered. The other crimes included in the draft Code are not subject to such a

limitation provided that individuals can contravene these provisions without acting on behalf of a State. The majority of the crimes that could conceivably fall within this article are of such a nature that they are generally covered by national criminal legislation as well as specific conventions. There is, therefore, reason to presume that in many cases, conflicting penal provisions are to be found in national criminal law.

Paraguay

120. The Paraguayan Government notes that the article covers terrorism, not as committed by individuals or private groups, but by agents or representatives of a State, cases of which exist in the international community today.

United Kingdom of Great Britain and Northern Ireland

121. The United Kingdom regrets that the Commission has, as in the 1954 Draft, limited the scope of the article to State-sponsored terrorism. International terrorism is no longer confined to the acts of agents or representatives of States. In attempting to distinguish between international and "internal" terrorism, the Commission has overlooked the important category of non-State-sponsored terrorism directed at States, which properly belongs in a definition of international terrorism. The United Kingdom would therefore urge the Commission to reconsider the definition of terrorism, including the present omission of "internal" terrorism. The latter is in practice more of a problem for many States than international terrorism. It should consider also the relationship of this article with international crimes omitted from the Code, such as hijacking and hostage-taking, which might fall within the present definition of international terrorism.

United States of America

122. In the view of the United States Government, article 24 purports to punish international terrorism, even though there is no generally accepted definition of "terrorism" and no adequate definition of terrorism is given by the Code. The Code attempts to define terrorism through the use of a tautology. The Code defines terrorism as the "undertaking, organizing, assisting, financing, encouraging or tolerating [by the agents or representatives of a State of] acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public". This definition is patently defective because "terror" is not defined.

123. Moreover, given the unsuccessful history of past attempts to achieve a universally acceptable general definition of terrorism, the United States is sceptical about the possibility of reaching consensus on such a provision, no matter how it is drafted. In response to the difficulty in reaching consensus on a general definition of terrorism, the international community has instead concluded a series of individual conventions that identity specific categories of acts that the entire international community condemns, regardless of the motives of the perpetrators, and that require the parties to criminalize the specified conduct, prosecute or extradite the transgressors and cooperate with other States for the effective implementation of these duties. As listed in

General Assembly resolution 44/29 of 4 December 1989, these conventions cover aircraft sabotage, aircraft hijacking, attacks against officials and diplomats, hostage-taking, theft or unlawful use of nuclear material, violence at airports and certain attacks on or against ships and fixed platforms. By focusing upon specific types of actions that are inherently unacceptable, rather than on questions of motivation or context as the draft Code does, the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism.

124. Another fundamental problem with article 24 of the Code is that it limits the crime of terrorism to acts committed by "agents or representatives of a State." In fact, many terrorist acts are committed by individuals acting in their private capacity. The United States cannot accept a definition of terrorism that excludes acts committed by persons who are either not acting as agents of a State, or whose affiliation with a State cannot be definitively proved in a court of law.

Switzerland

125. To the Swiss Government, it would appear that the elements constituting the crime of international terrorism might not, depending on circumstances, be clearly distinguished from those constituting intervention, defined as the act of intervening in the internal or external affairs of a State by fomenting subversive or terrorist activities. Does the act, when carried out by agents of a State, of financing or training armed bands for the purposes of sowing terror among the population and thus encouraging the fall of the Government of another State come under either provision?

C. Point of view of the Special Rapporteur

1. Explanatory remarks

126. Most Member States criticized the notion of limiting possible perpetrators of the crime of international terrorism to agents or representatives of a State. They believe that terrorism can also be committed by individuals acting on behalf of private groups or associations.

127. This criticism is both relevant and valid.

128. One Member State, sceptical about the possibility of reaching consensus on a general definition of terrorism, believes that the international community should continue to conclude specific conventions, such as the conventions covering hostage-taking, attacks against officials and diplomats, etc.

129. While such an approach is, of course, conceivable, it does not preclude a search for the common features of these various forms of terrorism and an effort to derive common rules applicable to their suppression and punishment. While it may be difficult to arrive at a general definition of terrorism, it is not impossible. The Convention of 16 November 1937 contained a definition of this concept; we should strive to improve it.

2. New text proposed by the Special Rapporteur

130. The Special Rapporteur proposes that the draft adopted on first reading should be amended as follows:

"International terrorism

"1. An individual who, as an agent or a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2 of this article shall, on conviction thereof, be sentenced [to ...].

"2. The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror [fear or dread] in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way."

3. Commentary

131. The new draft includes individuals as perpetrators of international terrorism, whether acting alone or belonging to private groups or associations.

132. It clarifies the aim sought by terrorism, which is to seek advantage or influence the action or political orientation of a government or change the constitutional form of a State.

133. The aim of terrorism is not to cause terror. Terror is not an end in itself but a means. Some commentaries express regret at the tautology that arises from using the word "terror" to define terrorism. This is why the Special Rapporteur used the words "fear" and "dread" in brackets. However, this lexical criticism is truly minor.

Article 25. Illicit traffic in narcotic drugs

A. Text of the draft

134. The draft text adopted on first reading is the following:

"1. An individual who commits or orders the commission of any of the following acts:

- undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context shall, on conviction thereof, be sentenced [to ...].

"2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property.

"3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law."

B. Observations of Governments

Australia

135. Australia strongly supports international action to deal with illicit trafficking in narcotic drugs and psychotropic substances. Accordingly, Australia has been an active participant in the negotiation of multilateral conventions which promote both national and international action against drug trafficking.

136. Australia acknowledges the concerns underlying article 25. It believes, however, that more detailed work needs to be done on a number of issues, including the relationship of article 25 with existing conventions, in particular, the 1988 United Nations Convention.

137. The enumerated acts constituting crimes under article 25 are inconsistent with those listed in the 1988 United Nations Convention. Article 3 of that Convention describes a lengthy series of acts which are to be established as offences under domestic law. Although many of these appear to have been omitted on the ground that they are not of sufficiently serious nature to attract international criminal sanctions, others perhaps should be included.

138. The enforcement of any article dealing with drug trafficking would depend heavily on effective provisions on extradition of alleged offenders, mutual legal assistance between States in support of their prosecution and money laundering.

139. Consideration also needs to be given to the relationship between the jurisdiction of national legal systems to deal with drug offences and any proposed international jurisdiction under the Code.

140. It is unclear why the phrase "psychotropic drugs" is used only in paragraph 3, when the whole article is intended to cover these substances.

Austria

141. In the view of the Austrian Government, it remains to be seen if this crime should be inserted in the present code of crimes. It is doubtful whether illicit traffic in narcotic drugs crime against the peace and security of

mankind. Furthermore, the consequences linked with the insertion of the Code (i.e., the non-prescriptibility) do not seem desirable from a political point of view.

Brazil

142. The Brazilian Government believes that the absence of an international element with regard to the crime in article 25 (Illicit traffic in narcotic drugs) is not justifiable.

United Kingdom of Great Britain and Northern Ireland

143. The United Kingdom notes that the 1954 Draft Code omitted drug-related crimes, along with piracy, traffic in women and children, counterfeiting and interference with submarine cables. The United Kingdom would have wished for a more detailed analysis of these crimes with a view to ascertaining whether they constitute crimes against the peace and security of mankind. It is the opinion of the United Kingdom that drug trafficking, though an international crime, is a borderline case for inclusion in a code as a crime against the peace and security of mankind. It may be asked what is to be gained by including in the Code an activity which is viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them.

United States of America

144. The United States Government notes that article 25 provides that trafficking in "narcotic drugs" is "illicit" if it is "contrary to internal or international law". It is unclear whether the reference to internal law is meant to refer only to the law of the State in which the individual is located (in which case it has little point) or whether it is meant to include the internal law of any State that is a party to the Code (in which case it would be amazingly broad).

Switzerland

145. In the view of the Swiss Government, the question arises as to whether the inclusion in the Code of a provision on international drug trafficking is warranted. After all, such traffic can be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed ever closer links between international drug trafficking and local or international terrorism. It is not without good reason that people commonly speak of "narcoterrorism". Apart from the harmful effects it has on health and well-being, international drug trafficking has a destabilizing effect on some countries and is therefore an impediment to harmonious international relations. In this connection, international drug trafficking indeed appears to be a crime against the peace and security of mankind. The Commission is therefore correct to include, in the draft Code, a provision criminalizing such traffic, whether it is carried out by agents of a State or simply by individuals.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

146. The Special Rapporteur explained in the introduction to the present report the reasons why he believed it necessary to retain in the draft the reference to illicit traffic in narcotic drugs on a large scale or in a transboundary context.

147. The phrase "on a large scale or in a transboundary context" refers not only to international illicit traffic in narcotic drugs, but also to domestic traffic on a large scale. It should not be forgotten that many small States are unable to prosecute perpetrators of such traffic where it is carried out on a large scale in their own territory. They would like for there to be an international jurisdiction with competence to try offences of this type.

2. New text proposed by the Special Rapporteur

148. Here is the proposed new text, which simplifies the one adopted on first reading:

"Illicit traffic in narcotic drugs

"1. An individual who commits or orders the commission of illicit traffic in narcotic drugs on a large scale or in a transboundary context shall, on conviction thereof, be sentenced [to ...].

"2. Illicit traffic in narcotic drugs means undertaking, organizing, facilitating, financing or encouraging any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

"3. For the purposes of paragraph 2, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property."

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FIRST REPORT ON STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

by

Mr. Václav MIKULKA, Special Rapporteur

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INTRODUCTION

A. Historical review

1. Previous work by the Commission on the topic of State succession

1. The topic of succession of States and Governments is one of the topics that the International Law Commission selected at its first session, in 1949, with a view to their codification. 1/ Pursuant to the recommendation which the General Assembly made to it in its resolution 1686 (XVI) of 18 December 1961, the Commission, at its fourteenth session, in 1962, listed the topic of succession of States and Governments among its priorities. The Commission decided further to establish a Subcommittee on Succession of States and Governments which would be responsible for preparing a preliminary report containing suggestions as to the scope of the topic, approaches to studying it and means of providing the necessary documentation.

2. At its fifteenth session, in 1963, the Commission considered the report of the Subcommittee, and decided that succession of Governments would be considered at that stage only to the extent necessary to complete the study on State succession. The Commission endorsed the broad outline, the order of priority of the headings and the division of the topic recommended by the Subcommittee, namely: succession in respect of treaties, succession in respect of rights and duties resulting from other sources than treaties (revised in 1968 to read "Succession in respect of matters other than treaties") and succession in respect of membership of international organizations.

3. The Commission, after having unanimously approved the Subcommittee's report, appointed Mr. Manfred Lachs as Special Rapporteur for the topic of succession of States and Governments. Following the resignation of Mr. Lachs, the Commission decided, at its nineteenth session, in 1967, to divide the topic into three main headings in accordance with the broad outline set forth in the report of the Subcommittee in 1963. The Commission appointed Sir Humphrey Waldock as Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui as Special Rapporteur for succession in respect of matters other than treaties. The Commission decided to leave aside, for the time being, the third aspect of the topic.

4. Following Sir Humphrey Waldock's resignation, the Commission decided, at its twenty-fifth session, in 1973, to appoint a new Special Rapporteur for the topic, Sir Francis Vallat, to succeed him. In accordance with the decision taken in 1963, it was agreed that priority should be given to the study on State succession and that succession of Governments should be considered only to the extent necessary to complete the study on State succession.

1/ Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925), p. 3.

5. The question of nationality, which was covered by a broader title, namely, "Status of the inhabitants", was at first part of the second aspect of the topic, 2/ namely, "Succession in respect of matters other than treaties".

6. This second aspect was considered by the Commission from 1968 to 1981, with some preliminary comments being made on State nationality during the debate on the first report of the Special Rapporteur at the twentieth session, in 1968. In view of its breadth and complexity, it was later narrowed down to the economic aspects of succession. Nationality was not included therein. 3/

7. While two sets of draft articles prepared by the Commission under the first two headings mentioned above led to the adoption of the Vienna Convention on Succession of States in respect of Treaties (1978) 4/ and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (183), 5/ other aspects of State succession were left aside by the Commission for more than one decade.

2. Previous work by the Commission on the topic of nationality

8. In the work of the Commission, the topic of nationality has its own history, separate from that of State succession. While the topic "Nationality, including statelessness" was also included in 1949 in the list of topics selected for codification, it was not given priority by the Commission.

9. At the fourth session in 1952, further to Economic and Social Council resolution 304 D (XI) of 17 July 1950, a draft convention on the nationality of married persons was submitted to the Commission by Mr. Manley O. Hudson, who had been appointed in 1951 as Special Rapporteur for the topic of nationality, including statelessness. This draft followed very closely the terms proposed by the Commission on the Status of Women and approved by the Economic and Social Council. However, the Commission was of the opinion that the question of

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2/ See first report on succession of States in respect of rights and duties resulting from sources other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur (Yearbook of the International Law Commission, 1968, vol. II, document A/CN.4/204, paras. 133-137).

3/ See Report of the International Law Commission on the work of its twentieth session, ibid. (A/7209/Rev.1, paras. 73 and 78), Yearbook of the International Law Commission, 1968, vol. II, pp. 220-221.

4/ United Nations, Juridical Yearbook, 1978, p. 106.

5/ United Nations, Juridical Yearbook, 1983, p. 139.

nationality of married women could only be considered in the broader context of the whole subject of nationality. 6/

10. With regard to the topic of elimination of statelessness, the Commission, further to Economic and Social Council resolution 319 B III (XI) of 11 August 1950, considered at its fourth session, in 1952, a working paper on statelessness submitted by the Special Rapporteur. The Commission requested him to prepare a draft convention on the elimination of statelessness in the future and one or more draft conventions on the reduction of future statelessness. At its fifth session, in 1953, the Commission adopted, on the basis of a report containing draft articles submitted by Mr. Roberto Córdova, the new Special Rapporteur appointed in 1952, replacing Mr. Hudson, two draft conventions, one on the elimination of future statelessness and the other on the reduction of future statelessness, which were then transmitted to Governments for comment.

11. The United Nations Conference on the Elimination or Reduction of Future Statelessness, of which the first session was held in Geneva in 1959 and the second in New York in 1961, adopted, on the basis of the second draft convention of the Commission referred to above, the Convention on the Reduction of Future Statelessness, which entered into force on 13 December 1971. 7/

12. With regard to present statelessness, the Commission in 1954 formulated its proposals in seven articles with commentaries and submitted them to the General Assembly as part of its final report on the topic of nationality, including statelessness. 8/ It further decided, accordingly, to "defer any further consideration of multiple nationality and other questions relating to nationality". 9/

3. Inclusion of the topic "State succession and its impact on the nationality of natural and legal persons" in the Commission's agenda

13. At its forty-fifth session, in 1993, the Commission decided to include in its agenda as one of two new topics the question of State succession and its

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6/ Nevertheless, other organs of the United Nations system have continued their consideration of the question of the nationality of married women. After the articles of the draft convention prepared by the Commission on the Status of Women had been finalized by the Third Committee, the General Assembly, in its resolution 1040 (XI) of 29 January 1957, adopted the Convention, which entered into force on 11 August 1958 (United Nations, Treaty Series, vol. 309, p. 65).

7/ United Nations, Treaty Series, vol. 989, p. 175.

8/ Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693), para. 37.

9/ Ibid., para. 39.

impact on the nationality of natural and juridical person. 10/ The General Assembly, in the light of the situation prevailing in Eastern Europe, endorsed this proposal in its resolution 48/31 of 9 December 1993.

14. At its forty-sixth session, in 1994, the Commission appointed the present Special Rapporteur for the topic. 11/ The General Assembly, in its resolution 49/51 of 9 December 1994, endorsed the intention of the Commission to undertake work on the topic and, at the same time, requested the Secretary-General to invite Governments to submit, by 1 March 1995, relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

B. Delimitation of the topic

15. The topic of nationality, as envisaged by the Special Rapporteur for State succession in respect of matters other than treaties in his first report, 12/ was part of the broader problem of the status of the inhabitants which, in addition to the question of the nationality of natural persons, has also to encompass that of conventions of establishment. The task which the Commission has now undertaken differs from the one defined in 1968 in two respects: first, it does not refer to the issue of conventions of establishment (which has become anachronistic); secondly, it encompasses the issue of the nationality of legal persons, which was not mentioned explicitly in 1968.

16. In order to define in a substantive way the relation between the topic under consideration and the two topics studied previously by the Commission, namely, State succession and nationality, including statelessness, it is useful to recall the statement contained in the first report of the Special Rapporteur, Mr. Bedjaoui, namely: "In all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality. The successor State does not let the inhabitants of the territory retain their former nationality. This is a manifestation of its sovereignty." 13/ In contrast to international treaties or debts, where one State replaces another in an international legal relation subject to transfer, the relation of the State to the individual which is covered by the concept of nationality excludes *a priori* any notion of "substitution" or "devolution". Nationality, like sovereignty, is always inherent. By its nature, therefore, nationality is not a "successional matter" as, for example, State treaties, property and debts, and so on, are.

17. The questions which the Commission must study in the context of the present topic are, of course, part of the branch of international law dealing with

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10/ Ibid., *Forty-eighth Session, Supplement No. 10* (A/48/10), para. 440.

11/ Ibid., *Forty-ninth Session, Supplement No. 10* (A/49/10), para. 383.

12/ *Yearbook ... 1968*, vol. II, document A/CN.4/204.

13/ Ibid., p. 11, para. 133.

nationality. By their nature, they are very similar to those which the Commission has already considered under the topic "Nationality, including statelessness". However, they differ from it in two respects: on the one hand, the Commission's vision is broader than before - it is not limited to the topic of statelessness (although this is of paramount importance), but covers all of the issues resulting from changes of nationality. On the other hand, the scope of consideration is limited to changes of nationality resulting from State succession. Changes of nationality should therefore be considered exclusively in relation to changes of sovereignty. What is involved is the phenomenon often termed "collective naturalizations". 14/

18. Owing to the progress made in its previous work in the area of the progressive development and codification of international law in respect of nationality and of State succession, the Commission is able to approach consideration of the present topic with a deeper knowledge of the relationship between nationality issues and issues of State succession.

19. The topic under consideration relates also to another question: that of the continuity of nationality, which arises in the context both of the present topic and of diplomatic protection, a topic included in the 1949 list which has never been considered. It is for the Commission to decide whether and to what extent this issue should be considered in the context of the present topic.

C. Working method

20. Consideration of the topic "State succession and its impact on the nationality of natural and legal persons", as defined by General Assembly resolution 49/51, falls into the category of special assignments. The General Assembly has, on some occasions, requested the Commission to consider specific texts or to prepare reports on specific legal issues without any consideration being given to the drafting of a convention on the topic or any decision being taken as to the final form which the outcome of the work should take. 15/ The Commission has always decided in such cases that it was free to adopt special methods with which to accomplish special assignments, rather than

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14/ See, e.g., "Code of Private International Law" (Bustamante Code), League of Nations, Treaty Series, vol. LXXXVI, No. 1950, art. 13.

15/ Thus, at the express request of the General Assembly, the Commission studied the following topics: draft Declaration on the Rights and Duties of States (1949), formulation of the Nürnberg Principles (1950), question of an international criminal jurisdiction (1950), question of defining aggression (1951), reservations to multilateral conventions (1951), draft code of crimes against the peace and security of mankind (1951 and 1954), extended participation in general multilateral treaties concluded under the auspices of the League of Nations (1962), question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (1972) and review of the multilateral treaty-making process (1979).

conform to the methods envisaged by its statute for the ordinary work of progressive development and codification.

21. In the view of the Special Rapporteur, the Commission should, in dealing with the present topic, retain this flexible approach in respect of the working method.

D. Form which the outcome of the work on this topic might take

22. When the Commission, at its forty-fifth session, included the topic "State succession and its impact on the nationality of natural and legal persons" in its agenda, it expressed the view that "[t]he outcome of the work ... could for instance be a study or a draft declaration to be adopted by the General Assembly", and decided that the final form of the work would be determined at a later stage. 16/

23. The General Assembly endorsed the Commission's decision to include in its agenda the new topics on the understanding that the final form to be given to the results of the work will be decided after a preliminary study is presented to the General Assembly. 17/

24. The history of the Commission shows that the work undertaken by the Commission under the heading of special assignments has culminated either in a simple report or in draft articles with commentaries, as, for instance, in the case of the draft Declaration on Rights and Duties of States, the formulation of the Nürnberg Principles, the draft Code of Crimes against the Peace and Security

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16/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), para. 439. The Commission thus took into consideration certain hesitations as to the form of the outcome of the work, as expressed in the preliminary note on the topic submitted at the forty-fifth session, as follows: "[t]he elaboration of a draft convention ... might be subject to the risk of facing the same kind of problems the Commission was facing during the work on the previous State succession topics (the length of the codification work, the problem of application of the convention in respect of the new States as non-parties to it, etc.)" (A/CN.4/454, p. 33-34). This view, however, was not shared by the entire Commission.

17/ See paragraph 7 of resolution 48/31 and paragraph 6 of resolution 49/51, which reads as follows: "The General Assembly ... Endorses the intention of the International Law Commission to undertake work on the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on nationality of natural and legal persons", on the understanding that the final form to be given to the work on these topics shall be decided after a preliminary study is presented to the General Assembly, and, in connection with the latter topic, requests the Secretary-General to invite Governments to submit by 1 March 1995 relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic".

of Mankind and the draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. In the last of the above-mentioned cases, the draft served as the basis for a convention. 18/

25. As a first step, the work of the Commission on the topic will have the character of a study to be presented to the General Assembly in the form of a report. In the view of the Special Rapporteur, the Commission will only be able to meaningfully discuss the form of the final outcome of the work after it has conducted an in-depth study of the topic.

E. Terminology used

26. In its work on the codification and progressive development of the law concerning succession of States in respect of treaties and matters other than treaties, the Commission has consistently borne in mind the desirability of using, as far as possible, common definitions and common basic principles, without ignoring or neglecting the specific characteristics of each topic. The Special Rapporteur therefore considers that in order to ensure uniformity of terminology, the Commission should continue to use the definitions it formulated previously in the context of the two conventions on succession of States, especially as regards the basic concepts, defined in article 2 of the two conventions as follows:

- "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

- "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

- "successor State" means the State which has replaced another State on the occurrence of a succession of States;

- "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

- "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

- "third State" means any State other than the predecessor State or the successor State.

18/ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973 (General Assembly resolution 3166 (XXVIII), annex); United Nations, Treaty Series, vol. 1035, p. 167).

27. As the Commission explained in its commentary to those provisions, the term "succession of States" is used "as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event". 19/ At that time, the Commission considered that the expression "in the responsibility for the international relations of territory" was preferable to other expressions such as "in the sovereignty in respect of territory", because it was a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case independently of the particular status of the territory in question. The Commission stated that the word "responsibility" should be read in conjunction with the words "for the international relations of territory" and was not intended to convey any notion of "State responsibility", a topic under study by the Commission at that time. 20/

28. The meanings attributed to the terms "predecessor State", "successor State" and "date of the succession of States" were merely consequential upon the meaning given to "succession of States" and did not appear to the Commission to require any comment. With regard to the expression "newly independent State", the Commission deemed it useful to note that it signified "a State which has arisen from a succession of States in a territory which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible, 21/ no distinction being drawn among the various cases of emergence to independence. The definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State or of a uniting of two or more existing States. 22/

I. CURRENT RELEVANCE OF THE TOPIC

29. As one eminent author has recognized, "[t]he effect of change of sovereignty upon the nationality of the inhabitants of the [territory concerned] is one of the most difficult problems in the law of State succession". 23/ Nevertheless, the same author stressed as early as 1956 that "[u]pon this subject, perhaps more than any other in the law of State succession, codification or international legislation is urgently demanded. It is undesirable that, as a result of change of sovereignty, persons should be

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19/ Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vienna, 4 April-6 May 1977, vol. III (A/CONF.80/4), p. 6.

20/ Ibid., p. 6.

21/ Ibid., p. 6.

22/ Ibid., p. 7.

23/ D. P. O'Connell, The Law of State Succession (Cambridge, England, Cambridge University Press, 1956), p. 245.

rendered stateless against their wills. It is equally undesirable that persons who have only an accidental relationship with absorbed territory should be invested with a nationality which they do not want." 24/

30. The change of nationality resulting from State succession is a matter of great importance because it occurs on a collective basis and has numerous serious consequences for the persons involved. Nationality is a precondition for the exercise of a number of political and civil rights. But this matter also has important implications with respect to the exercise of the sovereign powers of the States concerned, i.e., the successor and predecessor State. Thus, the employment of alien officials or alien control of natural resources or public utilities after the date of succession of States may constitute a real problem. 25/ Moreover, the loss of the nationality of the predecessor State and the difficulties connected to the acquisition of the nationality of the successor State may lead to many human tragedies.

31. But as this matter belongs primarily to the sphere of internal law, no serious attempt has ever been made to set up a universal instrument providing for a uniform solution to the problem. Nor has the Commission been anxious to deal with the problem of nationality in relation to that of State succession, which it discussed for nearly 20 years. 26/ Nationality has once again become an issue of special interest for the international community against the backdrop of the emergence of new States and, in particular, the dissolution of States in Eastern Europe. The manner in which problems relating to nationality in the context of State succession are being resolved has become a matter of concern to the international community. Nationality problems, and in particular the problem of statelessness, have attracted the attention of a number of governmental and non-governmental organizations, academic institutions and international forums, including the High Commissioner on National Minorities of the Conference (now Organization) on Security and Cooperation in Europe, 27/

24/ Ibid., p. 258.

25/ Ruth Donner, The regulation of nationality in international law, 2nd ed. (Irvington-on-Hudson, NY, Transnational Publishers, 1994), pp. 250-252.

26/ See the initial debate in 1963, during which Mr. Rosenne made a number of suggestions regarding the exclusion from the topic of "certain questions which belonged to the realm of municipal law" and Mr. Castrén likewise expressed the view that "it was not possible to exclude such questions as nationality". Mr. Castrén acknowledged, however, that in the working paper he had prepared as a member of the Subcommittee on Succession of States and Governments he had perhaps gone too far in suggesting the study of all questions relating to the legal status of the local population coming under the territorial and personal jurisdiction of the new State. Yearbook ... 1963, vol. II, p. 266.

27/ See the recommendations by the CSCE High Commissioner on national minorities upon his visits to Estonia, Latvia and Lithuania, CSCE Communication No. 124 of 23 April 1993, in: Nationalité, minorités et succession d'Etats, Documents 3, Additif (Centre de droit international, University of Paris X-Nanterre, Table ronde, December 1993).

the Arbitration Commission of the European Community Conference on Yugoslavia, 28/ the Office of the United Nations High Commissioner for Refugees (UNHCR), 29/ the Council of Europe and its Commission for Democracy through Law. 30/

32. Several international meetings involving scholars and legal experts from different countries have dealt with these issues, including the following:

- Table ronde sur la nationalité, les minorités et la succession d'Etats dans les pays d'Europe centrale et orientale, Paris, 3-4 December 1993; 31/

- Workshop on international law and nationality laws in the former USSR, Divonne-les-Bains, 25-26 April 1994; 32/

- Colloque sur la nationalité, les minorités et la succession d'Etats dans les pays d'Europe central et orientale, Prague, 22-24 September 1994; 33/

- Workshop on nationality matters, Dagomis (Russian Federation), October 1994; 34/

28/ See Opinion No. 2, 11 January 1992, International Legal Materials, vol. 31 (1992), p. 1497. For comments on Opinion No. 2, see Alain Pellet, "Note sur la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie", Annuaire français de droit international, vol. XXXVII (1991), pp. 339-341.

29/ UNHCR is particularly concerned with the question of statelessness in the context of State succession. Its contribution takes two forms: organization of seminars and symposia (see para. 32) and provision of technical assistance for the drafting of laws on nationality with a view to avoiding cases of statelessness.

30/ The work of the Commission on the question of nationality in the context of State succession is still at a very preliminary stage.

31/ Organized by the Centre de droit international (CEDIN), University of Paris X-Nanterre.

32/ Organized by UNHCR in cooperation with the International Institute of Humanitarian Law.

33/ Organized jointly by the Czech Society of International Law, Charles University (Prague) and CEDIN.

34/ Organized by the International Organization for Migration (IOM) in cooperation with UNHCR.

- Workshop on Citizenship, Statelessness and the Status of Aliens in the Commonwealth of Independent States (CIS) and Baltic States, Helsinki, 12-15 December 1994. 35/

33. During the last few years, in a number of States confronted with problems of State succession or of resumption of independence, new nationality laws have been adopted, or nationality laws dating from the period prior to the Second World War have been re-enacted. 36/

35/ Organized by the Government of Finland and UNHCR.

36/ As of the date of submission of the present report, only a few States had responded to the request of the Secretary-General for the submission of relevant materials, including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic of State succession and its impact on nationality. Thus, the following enumeration of national legislation is based not only on the replies of Governments but also on other available sources and cannot be considered as exhaustive:

- Croatia: Law on Croatian nationality of 28 June 1991; Law on amendments and supplements to the Law on Croatian nationality of 8 May 1992;
- Czech Republic: Law on acquisition and loss of citizenship of 29 December 1992;
- Eritrea: Eritrean Nationality Proclamation 21/1992 of 6 April 1992;
- Estonia: Law on citizenship (1938), re-enacted by the Resolution of the Supreme Council on the application of the Law on Citizenship of 26 February 1992; Law on Estonian language requirements for applicants for citizenship of 10 February 1993;
- Latvia: Law on citizenship (1919), re-enacted by the Resolution of the Supreme Council on the renewal of the Republic of Latvia citizens' rights and fundamental principles of naturalization of 15 October 1991;
- Lithuania: Law on citizenship of 10 December 1991; Resolution of the Supreme Council of Republic of Lithuania on the procedure for implementing the Republic of Lithuania law on citizenship of 11 December 1991;
- Slovenia: Law on citizenship of 5 June 1991;
- Slovakia: Law on acquisition and loss of citizenship of 19 January 1993.

For legislation on the issue of nationality, including the effects of State succession on nationality, previously compiled by the Codification Division, Office of Legal Affairs of the Secretariat, see Laws concerning nationality, United Nations Legislative Series, ST/LEG/SER.B/4 (New York, 1954) and supplement thereto, ST/LEG/SER.B/9 (New York, 1959), and Materials on succession of States in respect of matters other than treaties, United Nations Legislative Series, ST/LEG/SER.B/17 (New York, 1978).

34. With the growth in the number of new States, the rules on State succession have found a new material sphere of application. 37/ This justifies the effort to shed more light on the rules concerning nationality which might be applicable in the event of State succession.

II. NATIONALITY - CONCEPT AND FUNCTION

35. The problem of nationality is closely linked to the phenomenon of population as one of the constitutive elements of the State, because "[i]f States are territorial entities, they are also aggregates of individuals". 38/ While statehood is contingent on the existence of at least some permanent population, nationality is contingent on decisions of the State. And, being in fact "a manifestation of sovereignty, nationality is jealously guarded by States". 39/

36. Before any further thoughts are developed concerning the concept of nationality, a clear distinction must be made between the nationality of individuals and that of legal persons. The fundamental difference between the concept of the nationality of an individual (natural person) and that of a legal person has been explained by a number of authors. "All natural persons can possess the quality of a national, although in fact some of them, referred to as stateless persons, do not possess that quality in any country [...]. Legal persons, on the other hand, being persons created by law, are viewed as possessing a nationality. But this term then expresses a concept which is profoundly different, to the point where it has been denied that the term 'nationality' in this context has any value other than that of an image. Nevertheless, it continues to be used in positive law, but the subject-matter is too closely linked to the concept of legal personality for study of one to be dissociated from that of the other". 40/

37/ As for the content of such rules, the Arbitration Commission of the European Community Conference on Yugoslavia has stated that "[t]he phenomenon of State succession is governed by the principles of international law, from which the Vienna Conventions [on State succession] of 23 August 1978 and 8 April 1983 have drawn inspiration", Opinion 1, International Legal Materials, vol. XXXI (1992), p. 1495.

38/ James Crawford, The Creation of States in International Law (Oxford, Clarendon Press, 1979), p. 40.

39/ Johannes M. M. Chan, "The right to a nationality as a human right: the current trend towards recognition", Human Rights Law Journal, vol. 12, No. 1-2 (1991), p 1.

40/ Henri Batiffol and Paul Lagarde, Droit international privé, 7th ed., vol. 1 (Paris, Librairie générale de droit et de jurisprudence, 1981), pp. 63-64.

A. Nationality of natural persons

37. The nationality of individuals is most often seen as a legal bond between the individual and the State. According to Sir Robert Jennings and Sir Arthur Watts, the [n]ationality of an individual is his quality of being a subject of a certain state". 41/ Henri Batiffol and Paul Lagarde consider that, according to current thinking, legal nationality in "the juridical attachment of a person to the population forming a constitutive element of a State. This attachment subjects the national to the so-called personal competence of that State, which is enforceable against other States". 42/ The Harvard Draft Convention on Nationality defines nationality as "the status of a natural person who is attached to a State by the tie of allegiance" 43/ while, for D. P. O'Connell, "the expression 'nationality' in international law is only shorthand for the ascription of individuals to specific States for the purpose either of jurisdiction or of diplomatic protection. In the sense that a person falls within the plenary jurisdiction of a State, and may be represented by it, such a person is said to be a national of that State". 44/

38. The various components of the concept of nationality have been identified by the International Court of Justice in a definition which states that nationality is:

> "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State". 45/

39. Aside from the meaning given to the concept of nationality at the international level, there can be various categories of "nationals" at the level of internal law:

> "... a State's internal laws may distinguish between different kinds of nationals - for instance, those who enjoy full political rights, and are on

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41/ Sir Robert Jennings and Sir Arthur Watts, eds., Oppenheim's International Law, 9th ed., vol. I, parts 2-4 (London, Longman, 1992), p. 851.

42/ Batiffol and Lagarde, op. cit., p. 60.

43/ American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 22.

44/ D. P. O'Connell, State Succession in Municipal Law and International Law, vol. I (Cambridge, England, Cambridge University Press, 1967), p. 498.

45/ Nottebohm case, I.C.J. Reports, 1955, p. 23. As Jennings and Watts point out, the last part of this passage does not entirely reflect the situation which exists in cases of dual nationality (see op. cit., p. 854, note 13).

that account named citizens, and those who are less favoured, and are on that account not named citizens. In some Latin American countries, for example, the expression 'citizenship' has been used to denote the sum total of political rights of which a person may be deprived, by way of punishment or otherwise, and thus lose 'citizenship', without being divested of nationality as understood in international law. In the United States, while the expression 'citizenship' and nationality are often used interchangeably, the term 'citizen' is, as a rule, employed to designate persons endowed with full political and personal rights within the United States, while some persons - such as those belonging to territories and possessions which are not among the states forming the Union - are described as 'nationals'. They owe allegiance to the United States and are United States nationals in the contemplation of international law; they do not possess full rights of citizenship in the United States. It is their nationality in the wider sense, not their citizenship, which is internationally relevant. In the Commonwealth it is the citizenship of the individual States of the Commonwealth which is primarily of importance for international law, while the quality of a 'British subject' or 'Commonwealth citizen' is primarily relevant only as a matter of the internal law of the countries concerned.

"'Nationality', in the sense of citizenship of a certain State, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race". 46/

40. However, other examples may be cited:

"Since nationality defines the population constituting the internal order vis-à-vis the external order, the possible modalities concerning the participation of nationals in internal legal affairs, in particular as regards political rights, is of little importance. Thus the distinction between French citizens and French subjects, 'indigenous inhabitants of the colonies', has had no effect with regard to nationality, for the latter, as well as the former, were part of the population forming a constitutive element of the French State. The Act of 7 May 1946 sanctioned the situation by providing that 'all nationals of the overseas territories (including Algeria) possess the quality of citizen', while adding 'special laws shall establish the conditions in which they shall exercise their rights as citizens'.

"The 1946 Constitution (art. 81) had, however, introduced the quality of 'citizen of the French Union', possessed by French men and women, citizens of protected or associated States and inhabitants of associated territories [...]. The 1958 Constitution, on the other hand, stated that there is only a citizenship of the Community (art. 77).

"The term ressortissants has been used to express a concept whereby certain aliens who are more or less permanently dependent on the sovereignty concerned are approximated to nationals. Those involved were

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46/ Oppenheim's International Law, op. cit., pp. 856-857.

essentially individuals belonging to a protectorate or a country under mandate: Tunisians and Moroccans were said to be 'French ressortissants', although they did not possess French nationality.

"It should be noted, however, that this never involved more than the granting to certain of aliens rights which were refused to others; from the legal standpoint, they remained aliens." 47/

41. The existence of different categories of nationality within a State has been a phenomenon specific to the federal States of Eastern Europe: the Soviet Union, Yugoslavia and Czechoslovakia. Thus, for example, at the time of the creation of the Czechoslovak Federation, in 1969, Czech and Slovak nationalities were introduced parallel to Czechoslovak nationality, which originally had been the only nationality. Law No. 165/1968 establishing a formal distinction between the (federal) Czechoslovak nationality and that of each of the two republics forming the Federation opened the way for the adoption by the two republics of their own laws on nationality: Law No. 206/68 of the Slovak National Council and Law No. 39/69 of the Czech National Council. 48/

42. The introduction of citizenship of the two republics was based on the principle of jus soli, whereas the federal legislation, like the Czechoslovak legislation which preceded the date of the creation of the Federation, was based on the principle of jus sanguinis. The traditional principle of jus sanguinis was nevertheless used to determine the nationality of children under 15 years old.

43. A recent noteworthy development is the establishment by the Maastricht Treaty on European Union of a "citizenship of the Union". Under the terms of article 8, "[e]very person holding the nationality of a member State shall be a citizen of the Union". 49/ The question whether an individual possesses the nationality of a member State is to be settled solely by reference to the national law of that State. 50/

44. Moreover, the concept of nationality or of the term "national" may, for the purposes of a particular treaty, have yet another meaning. Thus, e.g., the Treaty of St. Germain and other peace treaties of 1919 use the term "ressortissant" as a notion wider than that of "national". 51/ Many

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47/ Batiffol and Lagarde, op. cit., pp. 65-66.

48/ The Czech law and the Slovak law on nationality were amended by Laws Nos. 92/1990 and 88/1990 of the Czech National Council and the Slovak National Council respectively.

49/ International Legal Materials, vol. XXXI (1992), p. 259.

50/ Ibid., p. 365.

51/ See National Bank of Egypt v. Austro-Hungarian Bank, Annual Digest of Public International Law Cases, vol. 2 (1923-24), No. 10, p. 25.

agreements for the settlement of claims contain special definitions to identify the nationals whose claims are being settled. 52/

45. The notion or the concept of nationality may be defined in widely different ways depending on whether the problem is approached from the perspective of internal (municipal) or international law. For the function of nationality is, in each case, different. Seen from the second perspective, to the extent that individuals are not direct subjects of international law, nationality is the medium through which they can normally enjoy benefits from international law. For only nationals automatically enjoy the advantages of the diplomatic protection and the set of rules - whether convention or not - accepted by States in their mutual relations for the benefit of their nationals. Nationality is also a prerequisite for the full enjoyment of human rights.

B. Nationality of legal persons

46. By way of analogy with the position of individuals, legal persons, (corporations) are to have a nationality as well. As in the case of an individual, the existence of the bond of nationality is necessary for the purposes of application of international law in relation to a legal person, and, most often, for the purposes of diplomatic protection. 53/

47. Corporations are usually considered to possess the nationality of the State under the laws of which they have been incorporated and to which they owe their legal existence, in so far as it is a matter of municipal law to determine whether an entity has legal personality at all, 54/ and what the effects of such determination are. Consequently, if a company incorporated under the laws of one State establishes, under the laws of another, a subsidiary as a separate legal person, in principle the two companies will have different nationalities for the purposes of international law. As the International Court of Justice observed in the Barcelona Traction case:

> "The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has registered office. These two criteria have been confirmed by long practice and by numerous international instruments.

52/ See, e.g., article VII of the Agreement between the Islamic Republic of Iran and the United States of America concerning the settlement of claims, International Legal Materials, vol. XX (1981), p. 232.

53/ Cf. Lucius Caflisch, "La nationalité des sociétés commerciales en droit international privé", Annuaire suisse de droit international, vol. XXIV (1967), pp. 119-160.

54/ In some exceptional cases, where the State has brought the company's existence to an end, the company may nevertheless be regarded by other States as continuing to exist. See Ignaz Seidl-Hohenveldern, Corporations in and under international law (Cambridge, England, Grotius Publications, 1987), pp. 29-38 and 51-54.

> This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist". 55/

Thus, in many cases the traditional criterion of the company's place of incorporation and location of its registered office establishes just a prima facie presumption of the bond of nationality between the company and the State.

48. There is a limit to the analogy that can be drawn between nationality of individuals and the nationality of corporations. Most authors warn that:

> "while sometimes convenient, [this analogy] may often be misleading: those rules of international law which are based upon the nationality of individuals are not always to be applied without modification in relation to corporations. Various considerations militate against attributing to the nationality of corporations the same consequences as attach to the nationality of individuals: those include the manner in which corporations are created, operate and are brought to an end, their development as legal entities distinct from their shareholders, the inapplicability to companies of the essentially personal conception of allegiance which underlies the development of much of the present law regarding nationality, the general absence in relation to companies of any nationality legislation to provide a basis in municipal law for the operation of rules of international law, the great variety of forms of company organization, and the possibilities for contriving an artificial and purely formal relationship with the state of 'nationality'". 56/

49. There exists no rigid notion of nationality with respect to legal persons, and different tests of nationality are used for different purposes. For this reason, it is a usual practice of States to expressly provide, in a treaty or in their domestic laws, which legal persons may enjoy the benefits of treaty provisions reserved to "nationals" or to define "national" companies for the purposes of application of national laws in specific fields (fiscal law, labour law, etc.). Owing to the fact that legal persons may have links with several States, the establishment of the "national" status of a company involves a balancing of various factors.

50. The above remarks lead us to the question whether it is useful to undertake the study of the impact of State succession on the nationality of legal persons in parallel with the study concerning the nationality of natural persons, and, in particular, whether the study of problems of nationality of legal persons has the same degree of urgency as the study of problems concerning the nationality of individuals. The obvious alternative for the Commission is to separate the two issues and to study first the most urgent one - that of the nationality of natural persons.

55/ Case concerning the Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports, 1970, p. 42.

56/ Oppenheim's International Law, op. cit., pp. 860-861.

III. ROLES OF INTERNAL LAW AND INTERNATIONAL LAW

A. Internal law

51. In the literature, it is generally accepted that "it is not for international law but for the internal law of each State to determine who is, and who is not, to be considered its national". 57/ The State, and the State alone, is entitled to decide that an individual is or is not its national. "[N]ationality is essentially an institution of the internal laws of States, and the international application of the notion of nationality in any particular case must be based on the nationality law of the State in question." 58/ The law of each State "determines who are its nationals, both on the basis of origin and as regards the conditions governing the acquisition or subsequent loss of its nationality". 59/

52. The principle that it is for each State to determine under its own law who are its nationals was confirmed by article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws. 60/ This principle was also asserted by the Permanent Court of International Justice in its opinion with regard to the nationality decrees issued in Tunis and Morocco, 61/ and in its opinion on the question concerning the acquisition of Polish nationality, 62/ and it was reiterated by the International Court of Justice in the Nottebohm Judgment. 63/

53. There is therefore a broad consensus in both the literature and the practice of the courts in favour of recognizing that nationality is governed essentially by internal law. This conclusion remains valid in cases where the acquisition of nationality is settled by treaty or when the national law lists as one of the means of acquisition of nationality acquisition under an

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57/ Ibid., p. 852.

58/ Ibid., p. 853.

59/ Batiffol and Lagarde, op. cit., p. 58. According to Crawford, "[i]t appears that the grant of nationality is a matter which only States by their municipal law (or by way of treaty) can perform. Nationality is thus dependent upon statehood, not the reverse" (op. cit., p. 40).

60/ See Laws Concerning Nationality, United Nations Legislative Series, ST/LEG/SER.B/4, p. 567.

61/ P.C.I.J., 1923, Series B, No. 4, p. 24.

62/ Ibid., No. 7, p. 16.

63/ Nottebohm case, I.C.J. Reports, 1955, p. 4.

international treaty. 64/ In fact, this is simply a reference, by national law, to a qualification for or criterion of acquisition agreed to among States which is applied as lex specialis in relation to the basic criteria established by law.

54. The role of internal law as the principal source of nationality is also recognized in cases of changes of nationality resulting from a succession of States, often termed "collective naturalizations". Article 13 of the Bustamante Code, for example, stipulates that:

> "In collective naturalizations, in case of the independence of a State, the law of the acquiring or new State shall apply, if it has established in the territory an effective sovereignty which has been recognized by the State trying the issue, and in the absence thereof that of the old State, all without prejudice to the contractual stipulations between the two interested States, which shall always have preference." 65/

In the same vein, O'Connell refers to the practice of English courts, concluding that:

> "the question to what State a person belongs must ultimately be settled by the municipal law of the State to which he claims or is alleged to belong. It is the municipal law of the predecessor State which is to determine which persons have lost their nationality as a result of the change; it is that of the successor State which is to determine which persons have acquired its nationality". 66/

55. At the same time, however, according to the opinion of some writers, there are "perhaps exceptional cases where individuals may possess a nationality for international purposes in the absence of any applicable nationality law." 67/ This begs the question whether the existence of two distinct concepts of nationality - one under municipal law and another under international law - is accepted. This issue has a special importance in the context of State succession, when considerable time can elapse between the "date of the State

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64/ See, for example, Citizenship Act of Slovenia, article 3, paragraph 4, in: Nationalité, minorités et succession d'Etats dans les pays d'Europe centrale et orientale, Documents 1, CEDIN Paris X-Nanterre, Table ronde - December 1993. See also O'Connell: "Even if the treaty provides that inhabitants of absorbed territory are to become nationals of the successor State the enactment is ineffective until embodied in municipal law", op. cit. (1956), p. 249, note 3, referring to Rudolf Graupner, "Nationality and State succession", The Grotius Society - Transactions for the Year 1946, vol. XXXII (1947), p. 94.

65/ See "Code of Private International Law" (Code Bustamante), loc. cit.

66/ O'Connell (1967), op. cit., p. 501.

67/ Oppenheim's International Law, op. cit., p. 853, note 10.

succession" and the adoption of the nationality law of the successor State. O'Connell describes this situation in the following words:

> "While the State concerned must first claim [to have] jurisdiction over the individual, or to represent him internationally, before he will actually be ascribed to it, it does not follow that such a person is regarded as a national by the State concerned, for, as in the case of Israel between 1948 and 1952, the State may lack a domestic conception of nationality. It would be fallacious to assume that, because international law permissively ascribes certain individuals to successor States in virtue of a change of sovereignty, these automatically become nationals in the eyes of municipal law, for the most international law can do is to approve or disapprove of a claim by successor States to bring individuals within their plenary jurisdiction, or of a claim to represent them in diplomatic matters." 68/

56. If the concept of nationality for international purposes is to be considered as generally accepted, what are its elements and what exactly is its function?

B. International law

1. Limitations on the discretionary power of the State

57. Although nationality is essentially governed by internal legislation, it is of direct concern to the international order. State sovereignty in the determination of its nationals does not mean, of course, the absence of all rational constraints. The legislative competence of the State with respect to nationality is not absolute. 69/ The various authorities which established the principle of State freedom also affirmed the existence of limits to that freedom.

58. Thus, in its advisory opinion in the case concerning nationality decrees issued in Tunis and Morocco, 70/ the Permanent Court of International Justice emphasized that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending on the development of international relations, and it held that even in respect of matters which in principle were not regulated by international law, the right of a State to use its discretion may be restricted by obligations which it may have undertaken towards other States, so that its jurisdiction becomes limited by rules of international law. 71/

68/ Op. cit., (1967), p. 498.

69/ Batiffol and Lagarde, op. cit., pp. 69-70.

70/ P.C.I.J., 1923, Series B, No. 4, p. 24.

71/ See Oppenheim's International Law, op. cit., p. 852.

59. The commentary to article 2 of the Draft Convention on Nationality of 1929 prepared by Harvard Law School's Research on International Law asserts that the power of a State to confer its nationality is not unlimited. 72/ As stated in article 1 of the Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States only "in so far as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality". 73/

60. The impact of the rules of international law in the area of nationality is of particular importance in cases of State succession. "Collective naturalizations" give rise to many problems, in view of the number of persons - sometimes the whole population - affected by the change. The complexity and urgency of these problems vary depending on the nature of the territorial change (transfer of territory, secession, dissolution of a State or uniting of States) and the manner (whether or not peaceful) in which it came about. But to what extent can international law claim ascendancy? Is it conceivable that an international authority, or at least the rules to which States are subject, would play a role in the allocation of individuals among different States in order to preclude either statelessness or positive conflicts?

61. According to the predominant opinion, the role of international law with respect to nationality is very limited. The function of international law is at the most to delimit the competence of the predecessor State to retain certain persons as its nationals and of the successor State to claim them as its own. International law cannot prescribe that such persons change their nationality, either automatically or by submission. While, on the one hand, it places restrictions upon the categories of persons whose nationality is claimed by the successor State, on the other hand, because of the restrictive character of its operation, international law cannot dictate to the predecessor State whether or not that State is obliged to retain these persons as its nationals. 74/ By delimiting the competence of States to ascribe their nationality to individuals, international law permits "some control of exorbitant attributions by States of their nationality, by depriving them of much of their international effect". Thus, "the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question". 75/

62. The most commonly quoted example in this respect is the Nottebohm case, in which the International Court of Justice stated that:

> "a State cannot claim that the rules [pertaining to the acquisition of nationality] it has thus laid down are entitled to recognition by another

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72/ See note 43 above, pp. 24-27.

73/ See note 60 above.

74/ O'Connell (1967), op. cit., p. 499.

75/ Oppenheim's International Law, op. cit., p. 853.

State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States." 76/

63. The necessary conclusion is that the function of international law with respect to nationality is, in principle, a negative function. In any event, international law cannot directly remedy the flaws of internal legislation, that is to say it cannot substitute for internal legislation indicating who are and who are not nationals of the State. There is no doubt that the International Court of Justice considered Nottebohm a national of Liechtenstein in accordance with that country's internal law. 77/

64. The function of international law is, therefore, in the first place, to delimit the competence of States, or in other words to eliminate as regards third States the consequences of an exaggerated or abusive exercise by a State of its legislative competence with respect to nationality. However, there is a long-recognized limitation deriving from human rights which should be added to this limitation. This point had already been raised in connection with the preparations for the 1930 Hague Conference. 78/ The development, after the Second World War, of international norms for the protection of human rights gave the rules of international law a greater say in the area of nationality. By virtue of these norms and principles, some of the processes of internal law, such as those leading to statelessness or any type of discrimination, have become questionable at the international level.

65. According to the Inter-American Court of Human Rights, while the conferment and regulation of nationality falls within the jurisdiction of the State, this principle is limited by the requirements imposed by international law for the protection of human rights. 79/ Unlike the first category of limitations discussed above, the substantive question in this case is not whether the State exercises its discretionary power within the scope of its territorial or personal competence, but whether it does so in a manner consistent with its international obligations in the field of human rights. But, let us state once again, the international norms which give rise to this second category of

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76/ I.C.J. Reports, 1955, p. 23.

77/ In the same vein, see also Oppenheim's International Law, op. cit., p. 856: "... where the effects in international law of a State's grant of nationality are limited, the individual will still be a national of that State for purposes of its own laws".

78/ "The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States." League of Nations Conference for the Codification of International Law, Bases for Discussion, vol. I (Nationality), C.73.M.38. 1929.V, Reply of the United States of America, p. 16.

79/ Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), ILR, vol. 79, p. 284.

limitations do not affect the validity of the national legislation and its effectiveness within the State. (We are leaving aside the question of the State's international responsibility for non-fulfilment of its obligations in the area of human rights protection.)

66. States are therefore subject to two types of limitations in the area of nationality, the first type relating to the delimitation of competence between States (whose non-compliance with the rules results in the non-enforceability against third States of the nationality thus conferred) and the second, to the obligations associated with the protection of human rights (whose non-observance entails international responsibility).

2. Forms of intervention of international law

67. International law intervenes through both customary and conventional rules. The sovereignty of the State in the determination of its nationals must therefore be exercised within the limits imposed by general international law and by international treaties. The Hague Convention refers to "international conventions, international custom, and the principles of law generally recognised with regard to nationality", and the Permanent Court of International Justice alluded to existing treaties in the two opinions previously cited. But neither the Convention nor the opinions indicate specific rules of positive international law which would have the effect of limiting the freedom of States.

68. Some customary rules which relate to the consequences resulting from nationality from the standpoint of third States have been developed in the context of diplomatic protection. It is in this context that the principle of effective nationality has emerged in international law. According to this principle, which was endorsed by the judgment of the International Court of Justice in the Nottebohm case, if nationality is to be enforceable against third States, an effective and genuine link must exist between the State and the individual concerned. A naturalization based on an insufficiently effective link does not oblige other States to recognize the right of the State which conferred naturalization to exercise diplomatic protection on behalf of that individual.

69. A survey of bodies of national legislation fails to reveal anything very conclusive about the existence of customary rules of public international law with respect to nationality. It is, however, established that a State cannot grant its nationality of origin to a person who has no link with it, on the basis of jus sanguinis or jus soli, a conclusion which has but limited practical import for the solution of the real problems arising in connection with State succession. It is therefore the case that customary international law offers only a few guidelines to States for the formulation of their legislation on nationality.

70. While the rules of customary law are still at the elementary stage and provide a merely rudimentary basis, international conventions and treaties are more developed. They often aim at a harmonization of national legislations, with a view to eliminating the unfortunate consequences which result from the use by States of differing processes of acquisition or loss of nationality.

Some of these consequences - such as statelessness - are considered more serious than others - such as double nationality - for the international community.

71. There has been for some time an effort to reduce, through the adoption of international conventions, the instances of statelessness or, where that is not possible, to render the position of stateless persons less difficult. The Hague Codification Conference of 1930 adopted a number of provisions aimed at reducing the possibility of statelessness, as well as a unanimous recommendation to the effect that it was desirable that, in regulating questions of nationality, States should make every effort to reduce so far as possible cases of statelessness. Among the multilateral treaties relating to this problem the following instruments must be mentioned: the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 80/ its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness as well as the 1954 Convention relating to the Status of Stateless Persons 81/ and the 1962 Convention on the Reduction of Statelessness. 82/

72. The problems resulting from dual nationality are addressed in the above-mentioned 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws and its Protocol relating to Military Obligations in Certain Cases of Dual Nationality of 1930, in the Arab League Convention on Nationality of 1954 and in the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded between the States members of the Council of Europe in 1963. The issue of dual nationality may, moreover, give rise to specific problems in some States (namely those with a large immigrant population) and may therefore also require regulation on a bilateral basis. 83/

73. While only very few provisions of the above conventions directly address the issue of nationality in the context of State succession (as, for example, article 10 of the Convention on the Reduction of Statelessness), they cannot be deemed as simply irrelevant in such situations. First of all, they provide useful guidance to the States concerned by offering solutions which can mutatis mutandis be used by national legislators in search of solutions to problems arising from territorial change. Secondly, they may be, when the parties thereto include the predecessor State, formally binding upon successor States in accordance with the relevant rules of international law governing State succession in respect of treaties. These instruments can thus add to the general limitations imposed by customary rules of international law on the discretion of the successor State in the field of nationality.

80/ See note 60 above.

81/ United Nations Treaty Series, vol. 360, p. 117.

82/ United Nations Treaty Series, vol. 989, p. 175.

83/ See, e.g., para. 5 of the Joint Communiqué on the normalization of relations between China and Malaysia, International Legal Materials , vol. XIII (1974), p. 877.

74. Other international treaties directly concerned with problems of nationality in cases of State succession have played an important role, in particular after the First World War. They have established, in a relatively uniform way, the criteria for acquiring the nationality of successor States. The most frequently used criterion was that of domicile or habitual residence. Examples of such treaty provisions include articles 4 and 6 of the Versailles Treaty of 28 June 1919 between the Allied Powers and Poland. 84/ The treaties adopted after the First World War provided, at the same time, for the recognition, by the defeated States, of a new nationality acquired ipso facto by their former nationals under the laws of the successor State and for the consequent loss of the allegiance of these persons to their country of origin. 85/ These multilateral treaties have been supplemented by bilateral agreements between the States concerned. 86/

C. Principles of law generally recognized with regard to nationality

75. As was stated earlier, the Hague Convention includes "the principles of law generally recognised with regard to nationality" among the limitations to which the freedom of States is subjected in the area of nationality. But the Convention remains silent with respect to the precise content of this concept, which the Commission might therefore attempt to spell out in its study of the subject.

IV. LIMITATIONS ON THE FREEDOM OF STATES IN THE AREA OF NATIONALITY

A. Principle of effective nationality

76. It is widely accepted that, as in the case of naturalization in general, "[t]here must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned". 87/ Such a link may, in cases of State succession, have special characteristics. No

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84/ See "Laws concerning nationality", United Nations Legislative Series, ST/LEG/SER.B/4, pp. 586-593.

85/ See ibid.

86/ See, for example, the Traité realtif au droit de la nationalité et à la protection des minorités entre la Tchécoslovaquie et l'Autriche du 7 juin 1920, in: Nationalité, minorité et succession d'Etats dans les pays d'Europe centrale et orientale, op. cit., document 2.

87/ O'Connell (1967), op. cit., p. 499.

doubt, "[t]erritory, both socially and legally, is not to be regarded as an empty plot: territory (with obvious geographical exceptions) connotes population, ethnic groupings, loyalty patterns, national aspirations, a part of humanity, or, if one is tolerant of the metaphor, an organism. To regard a population, in the normal case, as related to particular areas of territory, is not to revert to forms of feudalism but to recognize a human and political reality, which underlies modern territorial settlements". 88/

77. A number of writers on the topic of State succession who hold the view that the successor State may be limited in its discretion to extend its nationality to persons who lack a genuine link with the territory concerned base their argument on the decision of the International Court of Justice in the Nottebohm case.

78. In its judgment, the Court indicated what considerations have been regarded as relevant in establishing a genuine connection, as follows:

> "International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc." 89/

79. The Court's judgment admittedly elicited some criticism, although the principle of effective nationality as such was not challenged. In particular, the Nottebohm judgment was reproached for not furnishing any criterion by which to establish the effectiveness of an individual's link with a State. 90/ It has been argued, in particular, that the Court had transferred the requirement of an effective connection from the context of dual nationality to a situation involving only one nationality and that a person who had only one nationality should not be regarded as disentitled to rely on it against another State because he/she had no effective link with the State of nationality but only with a third State. The point has also been made that the Court did not, in its judgment, adequately consider the implications of its adoption of the theory of

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88/ Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford, Clarendon Press, 1990), p. 664.

89/ I.C.J. Reports, 1955, p. 22.

90/ The Italian-United States Conciliation Commission, in the Flegenheimer case (1958), went even further and said that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of fraud, negligence or serious error. See Reports of International Arbitral Awards, vol. XIV, p. 327.

"genuine link" in matters of diplomatic protection - which raised the question of the extent to which the State of which a person possessed purely formal nationality could protect him/her as against a State other than that of which he/she enjoyed effective nationality. It has also been stressed that it remained unclear whether the "genuine link" principle applied only to the acquisition of nationality by naturalization.

80. The concept of genuine link has a long history behind it. Different tests for genuine link have been considered or applied, such as domicile, residence or birth, both in general or in the context of changes of sovereignty. Thus, article 84 of the Treaty of Versailles stated that persons "habitually resident in any of the territories recognized as forming part of the Czecho-Slovak State will obtain Czecho-Slovak nationality ipso facto". But, as often pointed out, "[a]lthough habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law". 91/

81. Some authors have favoured the test of birth in the territory concerned as proof of a "genuine link", on the basis of which the successor State would be entitled to impose its nationality on those inhabitants of the territory born in it. This, however, is not broadly accepted. Nevertheless, in the case of Romana v. Comma, in 1925, the Egyptian Mixed Court of Appeal relied on this doctrine when it held that a person born in Rome and resident in Egypt became, as a result of the annexation of Rome in 1870, an Italian national. 92/

82. The need for the existence of certain links between an individual and a State as a basis for conferring nationality was emphasized by various members of the International Law Commission during the debates on the elimination and reduction of statelessness. 93/ The discussions envisaged the application of the genuine link principle for purposes of naturalization in general rather than in the specific context of State succession. In this respect, the question arises whether the application of the genuine link concept in the event of State succession presents any particularities in comparison with its application to traditional cases of naturalization. Another question is whether the criteria for establishing a genuine link could be further clarified and developed.

83. If views vary among commentators as to the use of this or that criterion, it seems to be because they have in mind different types of State succession. Yet, in drawing conclusions based on a particular type of State succession, they tend to express themselves in general terms, as if such conclusions applied in all situations. Similar problems can arise from the simplistic classification

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91/ O'Connell (1967), op. cit., p. 518.

92/ Annual Digest and Reports of Public International Law Cases, vol. 3, No. 195.

93/ See Yearbook .... 1953, vol. I, pp. 180-181, 184, 186, 218, 237 and 239.

of the various types of State succession into two categories, namely "universal" and "partial" succession.

84. The genuine link concept can give rise, in the context of State succession, to yet another delicate problem from the point of view of the individual concerned: as has happened in some recent cases of dissolutions in Eastern Europe, a series of State successions may occur on the same territory during the lifetime of a particular generation. The criterion for granting nationality to the inhabitants of the territory concerned may be different in each case, leading to surprising or even absurd results and considerable personal hardship.

B. Protection of human rights

85. It seems to be generally accepted that, in parallel with the rules on the delimitation of the competence of States with regard to nationality, some obligations of States in the area of human rights impose additional limits on the exercise of their discretion when it comes to granting or withdrawing their nationality. This holds true for naturalizations in general as well as in the particular context of State succession. The importance of this category of limitations increased considerably after the Second World War as a result of the impetus given to the protection of human rights. This is one of the more remarkable attributes of the developing legal framework in which recent cases of succession are set.

86. Unlike the successor States which appeared after the First World War, the successor States born of the most recent dissolutions are confronted with a substantial number of multilateral conventions. These conventions - especially, where appropriate, those on nationality, including the reduction of statelessness, and the protection of human rights - to which some predecessor States had become parties, are binding on successor States under the rules of international law governing succession of States in respect of treaties. Moreover, some successor States (including those of the USSR) have acceded to human rights instruments that impinge on the resolution of nationality questions, instruments to which the predecessor State had not become a party.

87. The obligations of States in the field of the protection of human rights put into question, above all, techniques leading to statelessness or to any kind of discrimination. Article 15 of the Universal Declaration of Human Rights, provides:

> "1. Everyone has the right to a nationality.
>
> "2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".

In the light of that provision, it is necessary to study carefully the precise limits of the discretionary competence of the predecessor State to deprive of its nationality the inhabitants of the territory it has lost, as well as the question whether an obligation of the successor State to grant its nationality to the inhabitants concerned can be deduced from the principle above. In the Special Rapporteur's view, it is no longer possible to maintain without any

reservation the traditional opinion expressed by O'Connell, according to which, "[u]ndesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality." 94/ The view that "apart from treaty a new State is not obliged to extend its nationality to all persons resident on its territory" 95/ reflects a more cautious approach in this respect. It seems to allow an a contrario conclusion that, as far as at least some inhabitants are concerned, such an obligation does exist. The contours of these obligations may vary according to the types of territorial changes.

88. In addition to possible obligations arising for States from the principles quoted above, article 8 of the Convention on the Reduction of Statelessness provides that a Contracting State "shall not deprive a person of its nationality if such deprivation would render him stateless". Furthermore, according to article 9 of the same convention, the State "may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds". In the event of State succession, this provision must be understood as a prohibition of any arbitrary policy on the side of the predecessor State when withdrawing its nationality from the inhabitants of the territory affected by State succession. The question, moreover, arises whether - and if so which - obligations incumbent upon successor States could possibly be deduced from these provisions.

89. As stated by one author, "[an] arbitrary change of nationality on the transfer of territory may have a number of different meanings. It may mean that the rule that nationality changes ipso facto with the change of sovereignty has an element of arbitrariness (...) [E]thnic options based on the subjective test of 'race', for example, may be arbitrary in the sense that they are contrary to the prohibition of discrimination based on race, sex, language, or religion, as expressed in article 1, paragraph 3, of the Charter of the United Nations and subsequent international instruments." 96/ Thus, the application of such criteria could be objected to on the basis of fundamental human rights standards. The international community has recently manifested on several occasions its concern about such practices and has endeavoured in competent multilateral forums to ensure that the States concerned adopt measures fully compatible with contemporary international law. Thus, as stressed by the same author, "the primary purpose of the law of State succession is to ensure social and political stability at a time when the transfer of sovereign powers is conducive to instability. Stability in this case may mean the refusal of [a choice of criteria] contrary to humanitarian considerations". 97/

94/ See O'Connell (1967), op. cit., p. 503.

95/ Crawford, op. cit., p. 41.

96/ Donner, op. cit., pp. 262-269.

97/ Ibid., p. 262.

V. CATEGORIES OF SUCCESSION

90. Contrary to the opinion that "no help is to be derived from the categories of the law of State succession", 98/ the Special Rapporteur holds the view that the study which the Commission is called upon to prepare must address separately the problems of nationality arising in the context of different types of territorial changes. Such a case-by-case analysis will reveal whether it is appropriate to maintain that "[m]ost of the principles referred to in connection with universal succession apply, mutatis mutandis, to the effects of partial succession on nationality." 99/

91. In the context of its work on the topic of succession of States in respect of treaties, the Commission "concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States". 100/ These categories were

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98/ Brownlie, op. cit., p. 661.

99/ See Paul Weiss, Nationality and Statelessness in International Law, 2nd ed. (Germantown, Maryland, Sijthoff-Noordhoff, 1979), pp. 144-145. The author nevertheless subjects the above statement to two qualifications: "(a) questions of nationality will, in cases of partial succession, more frequently be regulated by treaty; and (b) since the predecessor State continues to exist, two nationalities, the nationality of the predecessor and that of the successor State, are involved. There thus arises not only the question of acquisition of the new nationality, but also that of the loss of the old nationality". Ibid.

100/ Yearbook ..., 1974, vol. II (Part One), p. 172, document A/9610/Rev.1, para. 71. In its 1972 provisional draft (see Yearbook ..., 1972, vol. II, pp. 230 et seq., document A/8710/Rev.1, chap. II, sect. C), four distinct types of State succession were envisaged: (a) transfer of part of territory; (b) case of newly independent States; (c) uniting of States and dissolution of unions; and (d) secession or separation of part or parts of one or more States. However, at its twenty-sixth session, in 1974, the Commission, during the second reading of the draft articles on succession of States in respect of treaties, made some changes which, on the one hand, clarified and developed the first type of succession and, on the other, merged the last two types. First of all, the case of "transfer of part of territory" was termed "succession in respect of part of territory". The Commission added to this type the case where "territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State" (see Yearbook ..., 1974, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D, article 14). With this formula, the Commission intended to cover the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State. Such cases are assimilated, for the purposes of succession of States in respect of treaties, to the first type of succession, "succession in respect of part of territory". In addition, the Commission reclassified the last two types of State succession under a single heading entitled "Uniting and separation of States".

maintained by the diplomatic conference and are incorporated in the 1978 Vienna Convention on Succession of States in respect of Treaties.

92. For the purposes of the draft on succession of States in respect of matters other than treaties, the Commission deemed that, in view of the characteristics and requirements peculiar to the subject of succession of States in respect of matters other than treaties, particularly as regards State property, some further precision in the choice of categories was necessary. Consequently, as regards succession in respect of part of territory, the Commission decided that it was appropriate to distinguish and deal separately in the draft with three cases: (a) the case where part of the territory of a State is transferred by that State to another State; (b) the case where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State; (c) the case where a part of the territory of a State separates from that State and unites with another State. Also, as regards the uniting and separation of States, the Commission found it appropriate to distinguish between the "separation of part or parts of the territory of a State" and the "dissolution of a State". 101/ These categories were approved by the diplomatic conference and are at the basis of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

93. In the judgement of the Special Rapporteur, for the purposes of the current study of State succession and its impact on the nationality of natural and legal persons, it would be appropriate to keep the categories which the Commission adopted for the codification of the law of succession of States in respect of matters other than treaties rather than those it arrived at when considering the topic of succession of States in respect of treaties. The reason for so doing is quite straightforward: during the consideration of the current topic, the question of the continuity or discontinuity of the international personality of the predecessor State in cases of secession or dissolution of States has direct implications in the area of nationality. The issues which arise in the first case are by nature substantially different from those which arise in the second case. Moreover, there is a need for an additional adjustment to the categories as prepared by the Commission: for cases of uniting of States, a distinction is required between the situation in which a State unites freely with another State, consequently disappearing as a subject of international law, while the other State continues to exist as a subject of international law - "absorption" hypothesis - and the situation in which the two predecessor States unite to form a new subject of international law and therefore both disappear as sovereign States.

94. In view of the current requirements of the international community and since the decolonization process has now been completed, the Commission could limit its study to issues of nationality which arose during that process in so far as study of them sheds light on nationality issues common to all types of territorial changes.

101/ Yearbook ..., 1981, vol. II (Part Two), para. 75.

95. Like the Commission's previous work on the topic of State succession, the current study of the impact of State succession on the nationality of natural and legal persons should also apply "only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". 102/ As stated in the commentary to article 6 of the draft articles on succession of States in respect of treaties, the Commission "[i]n preparing draft articles for the codification of the rules of international law relating to normal situations naturally assumes that those [draft] articles are to apply to facts occurring and situations established in conformity with international law ... Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law". 103/ Accordingly, the current study should not deal with questions of nationality which might arise, for example, in cases of annexation by force of the territory of a State.

VI. SCOPE OF THE PROBLEM UNDER CONSIDERATION

96. In order to establish the precise framework of the preliminary study, it would be appropriate to delimit the scope of the problem ratione personae, ratione materiae and ratione temporis.

A. Scope of the problem ratione personae

97. The first problem is that of the definition of the categories of persons whose nationality is presumed to be affected as a consequence of State succession. According to a widespread opinion, "it is not at all certain which categories of persons are susceptible of having their nationality affected by change of sovereignty". 104/ This uncertainty is largely due to the fact that many authors try to answer this question in abstracto, as if there existed a unique and simple response which would apply to all categories of territorial changes.

98. By "persons susceptible of having their nationality affected" one must understand all individuals who could potentially lose the nationality of the predecessor State, as well as all individuals susceptible of being granted the nationality of the successor State. It is obvious that the two categories of persons will not necessarily be identical.

102/ See article 6 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

103/ Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977, vol. III (A/CONF.80/4), p. 12.

104/ O'Connell (1956), op. cit., p. 245.

99. Determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of total State succession, when the predecessor State or States disappear as a result of the change of sovereignty: all individuals possessing the nationality of the predecessor State lose this nationality as an automatic consequence of that State's disappearance. But determining the category of individuals susceptible of losing the predecessor State's nationality is quite complex in the case of partial State succession, when the predecessor State survives the change. In the latter case, it is necessary to distinguish among three groups of individuals possessing the nationality of the predecessor State: those born in the territory affected by the change of sovereignty and resident there at the date of the change, those born elsewhere but temporarily or permanently resident in the territory affected by the change, and those born in the territory affected by the change but temporarily or permanently absent at the date of the change. Within the last category a distinction must be made between those individuals residing in the territory which remains part of the predecessor State and those individuals residing in a third State.

100. The delimitation of categories of persons susceptible of acquiring the nationality of the successor State is not less difficult. In the event of total State succession, such as the absorption of one State by another State or the unification of States, when the predecessor State or States respectively cease to exist, all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State. But the inhabitants of the territory subject to State succession include, in addition, stateless persons residing in that territory at the date of succession. While "[p]ersons habitually resident in the absorbed territory who are nationals of [third] States and at the same time not nationals of the predecessor State cannot be invested with the successor's nationality, [o]n the other hand, stateless persons so resident there are in the same position as born nationals of the predecessor State. There is an 'inchoate right' on the part of any State to naturalize stateless persons resident upon its territory". 105/

101. In the case of dissolution of a State, to which the above considerations equally apply, the situation becomes more complicated owing to the fact that two or more successor States appear and the range of individuals susceptible of acquiring the nationality of each particular successor State has to be defined separately. It is obvious that there will be overlaps between the categories of individuals susceptible of acquiring the nationality of the different successor States.

102. Similar difficulties will arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of secession or transfer of a part or parts of territory.

105/ Ibid., pp. 257-258.

B. Scope of the problem ratione materiae

103. Ratione materiae, the preliminary study should deal with questions of loss of the nationality of the predecessor State and acquisition of the nationality of the successor State and with questions of conflict of nationalities susceptible of resulting from State succession, namely statelessness (negative conflict) and double or multiple nationality (positive conflict). Problems of statelessness or double nationality can arise both in the relations between the predecessor State and the successor State and in the relations between two or more successor States. Lastly, the question of option of nationality should also be considered in the context of the preliminary study.

1. Loss of nationality

104. The study should also aim at clarifying the extent to which the loss of the nationality of the predecessor State occurs automatically, as a logical consequence of the succession of States, and the extent to which international law obliges the predecessor State to withdraw its nationality from the inhabitants of the territory concerned or, on the contrary, limits the discretionary power of that State to withdraw its nationality from certain categories of individuals susceptible of changing nationality.

2. Acquisition of nationality

105. The study should answer the following questions: firstly, whether the successor State is required to confer its nationality on the population of the territory affected by the change of sovereignty; and, secondly, whether international law imposes limits - to be defined - on the discretionary power of the successor State as regards the collective naturalization of the population.

3. Conflict of nationalities

106. The answers which the study will provide to the above questions should furnish a basis for evaluating the extent to which contemporary international law guards against conflicts of nationalities, both positive (double or multiple nationality) and negative (statelessness). The Commission might also investigate whether the States concerned (the predecessor State and the successor State or States) are required to negotiate and settle nationality questions by mutual agreement with a view to warding off conflicts of nationalities, especially statelessness.

4. Option

107. The role of the right of option in the resolution of problems concerning nationality in cases of State succession is closely related to the function that international law attributes to the will of individuals in this field. There is substantial doctrinal support for the conclusion that the successor State is entitled to extend its nationality to those individuals susceptible of acquiring

such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals. Nevertheless, the right of option was provided for in a substantial number of international treaties, some of which have been mentioned above. In exceptional cases, this right was granted for a considerable period of time, during which affected individuals enjoyed a kind of dual nationality. 106/

108. For the majority of authors, the right of option can be deduced only from a treaty. Some authors, however, tend to assert the existence of an independent right of option as an attribute of the principle of self-determination. 107/

109. The right of option was quite recently envisaged also by the Arbitration Commission of the European Community Conference on Yugoslavia. The Commission recalled that, by virtue of the right to self-determination:

> "every individual may choose to belong to whatever ethnic, religious or language community he or she wishes.
>
> "In the Commission's view, one possible consequence of this principle might be for the members of [the] Serbian population in Bosnia and Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned". 108/

110. The function which contemporary international law attributes to the option of nationality is among the issues that should be further clarified in the preliminary study.

C. Scope of the problem ratione temporis

111. It follows from the title of the topic under consideration that the Commission is required to study the question of nationality solely in relation to the phenomenon of State succession. The scope of the study therefore excludes questions relating to changes of nationality which occur prior to or as a result of events or acts prior to the date of the succession of States. As a corollary, the scope of this study might also have excluded all questions relating to the acquisition or loss of nationality after the date of the succession of States. It should not be forgotten, however, that, in the majority of cases, successor States take time to adopt their laws on nationality

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106/ See the Evian Declaration (Algeria-France) of 19 March 1962, Treaty Series, vol. 507, p. 25, at pp. 35 and 37.

107/ See Joseph L. Kunz, "L'option de nationalité", Recueil des cours de l'Académie de droit international de La Haye, vol. 31 (1930-I) pp. 109-172; "Nationality and Option Clauses in the Italian Peace Treaty of 1947", American Journal of International Law, vol. 41 (1947), pp. 622-631.

108/ Opinion No. 2, loc. cit., p. 1498, and comments by Pellet, loc. cit.

and that in the interim period, between the date of the succession of States and the date of the adoption of the law on nationality, human life continues, children are born, individuals marry, and so forth. There may therefore be problems concerning nationality which, although not resulting directly from the change of sovereignty as such, nevertheless deserve the Commission's attention.

VII. CONTINUITY OF NATIONALITY

112. The rule of the continuity of nationality is a part of the regime of diplomatic protection. 109/ According to this rule, it is necessary that from the time of the occurrence of the injury until the making of the award, the claim belongs continuously and without interruption to a person having the nationality of the State putting such claim forward. The essence of the rule is to prevent the individual from choosing a powerful protecting State through a shift of nationality. 110/

113. Neither the practice nor the doctrine give a clear answer to the question of the relevance of this rule in the event of involuntary changes brought about by State succession. There are good reasons to believe that, in the case of State succession, this rule may be modified, because, as it was stated by President Verzijl in the Nájera case, "[i]n the case of collective changes of nationality on the basis of a succession of States, the legal situation must be weighed far less inflexibly than is customary in arbitral practice in normal cases of individual change of nationality by the deliberate act of the person concerned." 111/

114. Since the problem of continuity of nationality is closely associated with the regime of diplomatic protection, the question arises whether it should be brought within the scope of the current study. It seems unlikely that the topic of regime of diplomatic protection will be placed on the Commission's agenda in the near future and there is therefore no risk of overlap. In the circumstances, it would be beneficial to analyse the question of continuity of nationality in the context of the preliminary study which the General Assembly has asked the Commission to prepare.

109/ See Barcelona Traction case (second phase), I.C.J. Reports, 1970; Panevezys-Saldutiskis Railway case (1939), P.C.I.J. Series A/B, No. 76. See also Annuaire de l'Institut de droit international, vol. 36 (1931-II), pp. 201-212, vol. 37 (1932), pp. 479-529 and vol. 51 (1965-II), pp. 260-261. See also Eric Wyler, La règle dite de la continuité de la nationalité dans le contentieux international (Paris, Presses universitaires, 1990), pp. 9-15.

110/ See, e.g., Brownlie, op. cit., p. 481.

111/ See Pablo Nájera case, French-Mexican Claims Commission, Reports of International Arbitral Awards, vol. V, p. 488.